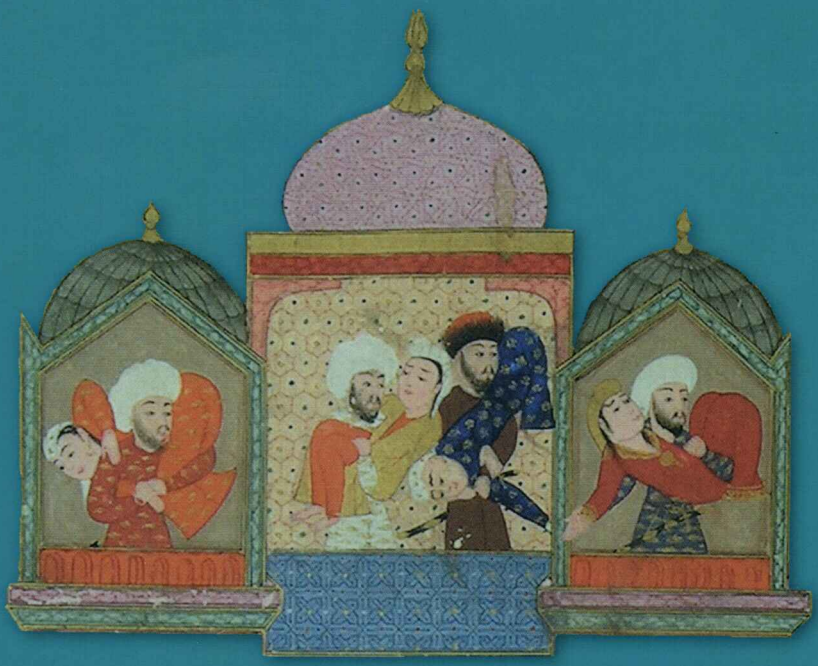
Politics of Honor in Ottoman Anatolia

SEXUAL VIOLENCE AND SOCIO-LEGAL SURVEILLANCE IN THE EIGHTEENTH CENTURY



BY

BAŞAK TUĞ

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Politics of Honor in Ottoman Anatolia

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Sexual Violence and Socio-Legal Surveillance in the Eighteenth Century

By

Başak Tuğ

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Abbreviations

ACR	Ankara Court Records
A.DVN.ŞKT	Şikayet Kalemi Belgeleri
BCR	Bursa Court Records
BOA	Başbakanlık Osmanlı Arşivi
IA	İslam Ansiklopedisi
IRCICA	Research Centre For Islamic History, Art and Culture
ISAM	İslam Araştırmaları Merkezi
TDV	Türkiye Diyanet Vakfı
TTK	Türk Tarih Kurumu

Introduction

The eighteenth century has long been one of the most understudied eras in Ottoman history. Due to the domination of the modernization theory in social sciences as well as the Orientalist, monolithic perception of Islam in historical writing, the Ottoman eighteenth-century was perceived as a ghost between the empire's "golden" and "modern" ages,[1] and thus it was long neglected in Ottoman historiography. In accord with this perception, up until the last two or three decades, the history of the Ottoman Empire in the seventeenth and eighteenth centuries has been predominantly conceptualized as being in a period of "decline;" this stems either from the view that the empire deviated from the strong, centralized state model[2] or from the perspective that the Ottoman Empire must be incorporated into the capitalist world economy.[3]

Revisionist studies have already challenged these conceptualizations. While the economic and political changes that took place in the seventeenth century have been reconstructed as an adaptation and reconfiguration of fiscal and administrative structures,[4] the theories of "decentralization" and the "age of the *ayans*" (local notables)[5] applied to the eighteenth century have been challenged by studies which claim that the Ottoman state, in fact, consolidated its power and ushered in an institutional centralization by integrating the

1 For classic examples of this perception, see H.A.R. Gibb and Harold Bowen, *Islamic Society and the West: A Study of the Impact of Western Civilization on Moslem Culture in the Near East* (London and New York: Oxford University Press, 1950); Halil İnalcık, *The Ottoman Empire: The Classical Age, 1300–1600* (London: Weidenfeld & Nicolson, 1973).

2 İnalcık, *The Ottoman Empire*.

3 Ömer Lütfi Barkan, "The Price Revolution of the Sixteenth Century: A Turning Point in the Economic History of the Middle East," *International Journal of Middle East Studies* 6 (1975); Çağlar Keyder and Faruk Tabak, *Landholding and Commercial Agriculture in the Middle East* (Albany: State University of New York Press, 1991).

4 Rifa'at Ali Abou-El-Haj, *Formation of the Modern State: The Ottoman Empire, Sixteenth to Eighteenth Centuries* (Albany: State University of New York Press, 1991); Suraiya Faroqhi, "Crisis and Change, 1590–1699," in *An Economic and Social History of the Ottoman Empire*, ed. Halil İnalcık (Cambridge: Cambridge University Press, 1994); Linda T. Darling, *Revenue-Raising and Legitimacy: Tax Collection and Finance Administration in the Ottoman Empire, 1560–1660* (Leiden and New York: E.J. Brill, 1996); İ. Metin Kunt, *The Sultan's Servants: The Transformation of Ottoman Provincial Government, 1550–1650* (New York: Columbia University Press, 1983).

5 Bruce McGowan, "The Age of the Ayans," in *An Economic and Social History of the Ottoman Empire, 1300–1914*, ed. Halil İnalcık and Donald Quataert (Cambridge and New York: Cambridge University Press, 1994).

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provincial notables into the fiscal administration through "centripetal" redistribution policies.[6] Barkey's study even explained these adaptation techniques as a sign of the longevity, durability, and continuity of the "empire."[7] Tezcan, in his most recent and groundbreaking work, conceptualized the early-modern Ottoman polity between the late sixteenth century and the early nineteenth century as the "Second Empire" because a limited government replaced the patrimonial empire of the previous period and a "proto-democratization" of the administration proceeded in parallel to the development of a monetary economy and more unified legal system.[8] The challenge to the "decline" perspective brought by these pioneering studies has been nuanced by further studies that decipher, through archival and court records, how this system worked in practice, both in the provinces and at the imperial center.[9]

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6 For the most prominent of them, see Mehmet Genç, *Osmanlı İmparatorluğu'nda Devlet ve Ekonomi* (Istanbul: Ötüken, 2000); Karen Barkey, *Bandits and Bureaucrats: The Ottoman Route to State Centralization* (Ithaca, NY: Cornell University Press, 1994); Ariel Salzmann, "An *Ancien Régime* Revisited: Privatization and Political Economy in the Eighteenth-Century Ottoman Empire," *Politics and Society* 21, no. 4 (1993); *Tocqueville in the Ottoman Empire: Rival Paths to the Modern State* (Boston: Brill, 2004). For general review works which problematized and challenged the Ottoman "decline," see Cemal Kafadar, "The Question of Ottoman Decline," *Harvard Middle Eastern and Islamic Review* 4, no. 1–2 (1997–98); Jane Hathaway, "Rewriting Eighteenth-Century Ottoman History," *Mediterranean Historical Review* 19, no. 1 (June 2004); Leslie Peirce, "Changing Perceptions of the Ottoman Empire: The Early Centuries," *Mediterranean Historical Review* 19, no. 1 (June 2004); Dror Ze'evi, "Back to Napoleon? Thoughts on the Beginning of the Modern Era in the Middle East," *Mediterranean Historical Review* 19, no. 1 (June 2004).

7 Karen Barkey, *Empire of Difference: The Ottomans in Comparative Perspective* (Cambridge and New York: Cambridge University Press, 2008).

8 Baki Tezcan, *The Second Ottoman Empire: Political and Social Transformation in the Early Modern World* (New York: Cambridge University Press, 2010).

9 For some examples of these monograph studies on Ottoman Arab provinces, see James Baldwin, "Islamic Law in an Ottoman Context: Resolving Disputes in Late 17th/Early 18th-Century Cairo" (PhD diss., New York University, 2010); Bruce Alan Masters, *The Origins of Western Economic Dominance in the Middle East: Mercantilism and the Islamic Economy in Aleppo, 1600–1750* (New York: New York University Press, 1988); Jane Hathaway, *The Politics of Households in Ottoman Egypt: The Rise of the Qazdağlıs* (New York: Cambridge University Press, 1997); Dina Rizk Khoury, *State and Provincial Society in the Ottoman Empire: Mosul, 1540–1834* (Cambridge and New York: Cambridge University Press, 1997); Beshara Doumani, *Rediscovering Palestine: Merchants and Peasants in Jabal Nablus, 1700–1900* (Berkeley: University of California Press, 1995). For studies on Anatolia, see Suraiya Faroqhi, *Towns and Townsmen of Ottoman Anatolia: Trade, Crafts, and Food Production in an Urban Setting, 1520–1650* (Cambridge and New York: Cambridge University Press, 1984); Haim Gerber, *State, Society and Law in Islam: Ottoman Law in Comparative Perspective* (Albany: State University of New York Press, 1994); Işık

A few exceptional studies show that vernacular social groups such as local notables and peasant-mercenaries were becoming much more integrated into the system of provincial government, especially in the eighteenth century, and thus the two groups inevitably merged with each other and into the social and economic policies of the Ottoman state.[10] This study on the moral governance

Tamdoğan-Abel, "Les modalités de l'urbanité dans une ville ottomane, les habitants d'Adana au XVIIIème siècle d'après les registres des cadis" (PhD diss., Ecole des Hautes Etudes en Sciences Sociales, 1998); Salzmann, *Tocqueville in the Ottoman Empire*; Hülya Canbakal, *Society and Politics in an Ottoman Town: 'Ayntab in the 17th Century* (Leiden and Boston: Brill, 2007); Boğaç A. Ergene, *Local Court, Provincial Society, and Justice in the Ottoman Empire: Legal Practice and Dispute Resolution in Çankırı and Kastamonu (1652–1744)* (Leiden and Boston: Brill, 2003); Yavuz Aykan, *Rendre la justice à Amid: Procédures, acteurs et doctrines dans le contexte ottoman du XVIIIème siècle* (Leiden and Boston: Brill, 2016). For works on Balkan and Eastern European provinces, see Charles Jelavich and Barbara Jelavich, *The Balkans in Transition: Essays on the Development of Balkan Life and Politics since the Eighteenth Century* (Hamden, CT: Archon Books, 1974); Rosistsa Gradeva, *Rumeli under Ottomans. 15th–18th Centuries: Institutions and Communities*, ed. Rosistsa Gradeva (Istanbul: ISIS Press, 2004); Tolga U. Esmer, "A Culture of Rebellion: Networks of Violence and Competing Discourses of Justice in the Ottoman Empire, ca. 1790 to 1808" (PhD diss., University of Chicago, 2009); Esmer, "Economies of Violence, Banditry and Governance in the Ottoman Empire around 1800," *Past & Present*, no. 224 (2014); Esmer, "The Precarious Intimacy of Honor in Late Ottoman Accounts of Para-Militarism and Banditry," *European Journal of Turkish Studies* [*Online*] 18 (2014); Esmer, "Notes on a Scandal: Transregional Networks of Violence, Gossip, and Imperial Sovereignty in the Late Eighteenth-Century Ottoman Empire," *Comparative Studies in Society and History* 58, no. 1 (2016). Finally, for social and political relations in Istanbul, see Betül Başaran, *Selim III, Social Control and Policing in Istanbul at the End of the Eighteenth Century: Between Crisis and Order* (Leiden: Brill, 2014); Engin Deniz Akarlı, "Law in the Marketplace: Istanbul, 1730–1840," in *Dispensing Justice in Islam: Qadis and Their Judgements*, ed. Muhammad Khalid Masud, Rudolph Peters, and David Stephan Powers (Leiden and Boston: Brill, 2006); Tülay Artan, "From Charismatic Leadership to Collective Rule, Introducing Materials on the Wealth and Power of Ottoman Princesses in the Eighteenth Century," *Dünü ve Bugünüyle Toplum ve Ekonomi*, no. 4 (1993); F. Zarinebaf, *Crime and Punishment in Istanbul: 1700/1800* (Berkeley: University of California Press, 2010); Shirine Hamadeh, *The City's Pleasures: Istanbul in the Eighteenth Century* (Seattle: University of Washington Press, 2008); Selim Karahasanoğlu, "A Tulip Age Legend: Consumer Behavior and Material Culture in the Ottoman Empire (1718–1730)" (PhD diss., State University of New York, Binghamton, 2009); Betül İpşirli Argıt, "Female Palace Slaves (*Cariyes*) in the Eighteenth Century Ottoman Empire" (PhD diss., Boğaziçi University, 2009).

10 For some exceptional studies that integrate the "center" and the "province" into an institutional analysis of Ottoman social policies and administration in the seventeenth and eighteenth centuries, see Madeline C. Zilfi, *The Politics of Piety: The Ottoman Ulema in the Postclassical Age (1600–1800)* (Minneapolis, MN: Bibliotheca Islamica, 1988); Khoury,

of sexuality in mid-eighteenth- century Ottoman Anatolia falls within this revisionist historiography. It aims to bring together the "center" and the "province" as well as "state" and "society" in an analysis of "power" in the mid-eighteenth-century Ottoman Empire. It conceptualizes the "state" as a complex formation consisting of multiple centers of power—without a clearly demarcated "center" or "periphery"—and as a "constellation of interlocking institutions"[11] in which a variety of administrative techniques were deployed.[12] In this sense, the central government can be evaluated as one of the actors in this Foucauldian definition of power.[13]

Yet, this study departs from most other works on the eighteenth-century Ottoman Empire, specifically through its emphasis on the disposition of imperial power in the socio-legal sphere. Although the above-mentioned studies provide invaluable insights into the political and economic aspects of power configurations in the eighteenth-century Ottoman Empire,[14] the institutional and legal mechanisms of governance over the socio-legal sphere have scarcely been studied.[15] This study contributes to the existing discussions on empire in

State and Provincial Society in the Ottoman Empire; Salzmann, *Tocqueville in the Ottoman Empire*; Canbakal, *Society and Politics in an Ottoman Town*; Ali Yaycıoğlu, *Partners of the Empire: The Crisis of the Ottoman Order in the Age of Revolutions* (Stanford, CA: Stanford University Press, 2016). For a similar approach to sixteenth-century social and administrative practices, see Leslie Peirce, *Morality Tales: Law and Gender in the Ottoman Court of Aintab* (Berkeley: University of California Press, 2003). For the nineteenth century, see Iris Agmon, *Family & Court: Legal Culture and Modernity in Late Ottoman Palestine* (Syracuse, NY: Syracuse University Press, 2006).

11 Salzmann, "An *Ancien Régime* Revisited."

12 Timothy Mitchell, "The Limits of the State: Beyond Statist Approaches and Their Critics," *American Political Science Review* 85, no. 1 (1991); Timothy Mitchell and Roger Owen, "Defining the State in Middle East. II," *Middle East Studies Association Bulletin* 25 (July 1991): 39–43; Akhil Gupta, "Blurred Boundaries: The Discourse of Corruption, the Culture of Politics, and the Imagined State," *American Ethnologist* 22, no. 2 (1995).

13 For Foucault's definition of power, see Michel Foucault, *The History of Sexuality, Volume 1: An Introduction* (New York: Random House, 1978); Foucault, "Governmentality," in *The Foucault Effect, Studies in Governmentality*, ed. Graham Burchell, Colin Gordon, and Peter Miller (Chicago: University of Chicago Press, 1991).

14 Gabriel Piterberg, *An Ottoman Tragedy: History and Historiography at Play* (Berkeley: University of California Press, 2003).

15 The studies on eighteenth-century court records, some of which I have already cited and some of which are discussed in the following pages, constitute exceptions in this regard. Many of them still approach institutional and legal parameters to grasp the "reality" and reconstruct social relationships in a particular time and region, rather than analyzing them as constituents of the "reality." Two exceptional comprehensive analyses of

the eighteenth century by showing how early-modern power operated in the social sphere as a set of social and legal practices.

This book examines the legal encounters between the central government, local *kadı*s (judges) and courts, and Ottoman subjects, first in order to explore how specific applications of Islamic law constructed sexuality and gender in practice, in the everyday lives of men and women in the mid-eighteenth century. With the premise that the definitions and practices of the "illicit" were constructed within a larger discursive field consisting of a web of legal practices, it aims thereby to analyze legal culture through the interplay of a variety of institutions and legal forces in the mid-eighteenth century. By juxtaposing the petitionary registers kept for the province of Anadolu with the petitions of the Anatolian people submitted to the Imperial Council, and the court records of Ankara and Bursa, two cities within this province, I analyze the institutional framework of the legal scrutiny of sexual order in mid-eighteenth-century Anatolia.

The four years between 1742 and 1745, on which this research concentrates, constitute a snapshot of intense legal and institutional interactions. A bureaucratic and institutional development in the imperial center that happened in 1742 makes this year an emblematic date. In this year the Imperial Council started to categorize its "petitionary registers"[16] according to the major provinces, including Anatolia. This development not only provides a base for the further scrutiny of legal processes in eighteenth-century Anatolia, but also signifies a transformation in the legal and administrative mentality of the imperial state. The diversification and proliferation of the petitionary registers[17] as a result of such a bureaucratic transformation in record-keeping practices,

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the eighteenth-century Ottoman society from the perspective of socio-legal history have recently been published. See Başaran, *Selim III, Social Control and Policing in Istanbul*; Aykan, *Rendre la justice à Amid*.

16 These were the imperial registers that recorded the imperial rescripts written in response to petitions and letters submitted by Ottoman subjects and the provincial legal-administrative authorities. Although the central government started to keep such registers from the second half of the seventeenth century, they are not separated according to provinces. In 1742 this organization made record-keeping practices more efficient, and after that date there was a proliferation of petitionary registers. See Chapter 2 for a more detailed discussion.

17 Faroqhi, a pioneer in Ottoman studies, first addressed the importance of the proliferation and diversification of these registers. For a more detailed discussion of these registers, see Suraiya Faroqhi, "Guildsmen Complain to the Sultan: Artisans' Disputes and the Ottoman Administration in the 18th Century," in *Legitimizing the Order: The Ottoman Rhetoric of State Power*, ed. Hakan Karateke (Leiden and Boston: Brill, 2005).

which occurred at the same time as a transfer of power from the sultan to the grand vizier's government, signify a shift in governmental mentality to a much broader view in the eighteenth century. The Ottoman state's interest in keeping records of the information gathered through the petitions of its subjects implies a further attempt at scrutinizing society, both legally and socially. By the mid-eighteenth century, this practice enabled the state not only to scrutinize local legal processes within a loosely-hierarchical appellate system, but also to watch provincial society more closely.

The year 1742 thus provides multiple avenues by which we can explore the history of sexual order in eighteenth-century Anatolia. First, the categorization of the petitionary registers according to provinces enlarges the borders of the "local," i.e., from the "town" of the court records to the province, and thus provides us with tool for writing the social history of a region like Anatolia. It also allows us to see the interactions between different legal institutions and actors, since all of the imperial rescripts recorded in these registers address the provincial judges and administrators concerning the issue at stake. This enables us to analyze the larger institutional framework of the the role of law in the construction of sexual and social order. Finally, these registers reveal the extent to which political power established moral order through its direct involvement in the surveillance and punishment of sexual crimes in the mid-eighteenth century.

The scrutiny over social order was directly related to the Ottoman state's anxieties about maintaining public order in the provinces, this arose as a result of the reconfiguration of power in economic, social, and political spheres in the late seventeenth and early eighteenth centuries. The relationship between the central government and provincial social groups was altered as a result of several inter-related changes, including the reconfiguration of the economic structure through tax-farming policies, the establishment of an oligarchic rule in the central administration, and the rise of local notables and dynastic families in the provincial government. The fragmented structure of the new power configuration triggered a vigilant scrutiny of public and social order by the Ottoman state in eighteenth-century Anatolia. This surveillance was established through centripetal means in order to control the provinces. Sexual crimes, as the emblematic face of disorder, constituted one of the most important subjects of this surveillance.

Yet, the mechanisms and technologies of power in the eighteenth century were, of course, different from those of "modern" Foucauldian power.[18] In this

18 See Foucault, "Governmentality;" Foucault, *Discipline and Punish: The Birth of the Prison* (New York: Vintage Books, 1995).

book, the term "early-modern" is often used to imply this difference. In this regard, I cautiously employ the terms "scrutiny" and "surveillance" alongside "early-modern" in an attempt not to equate forms of power in the eighteenth century with modern forms that crystallized only in the nineteenth century.[19] It is important to note that the disciplinary techniques of power, which mainly concentrate on the control of the population, had not yet been established in the eighteenth century in the Ottoman Empire.

This work is, by necessity, a social history of illicit sexuality together with the legal-institutional history of the mid-eighteenth century. We must comprehend the workings of the legal system in the specific period in order to analyze this social phenomenon through legal documents. However, in studies of Ottoman history, legal institutions have received little attention as "distinct social institutions."[20] Throughout Ottoman history, and especially by the mid-eighteenth century, as I demonstrate in this book, the Imperial Council took on important judicial functions alongside and as a higher court in a loosely hierarchical appellate system. Yet, its judicial functions, i.e., accepting petitions and hearing and deciding and/or forwarding cases to other courts, have been mostly neglected in Ottoman studies.[21] Similarly, until the 1990s, *kadı* court

19 Please see the conclusion for a further discussion of this issue.

20 Iris Agmon and Ido Shahar, "Theme Issue: Shifting Perspectives in the Study of *Shari'a* Courts: Methodologies and Paradigms," *Islamic Law and Society* 15 (2008), 3.

21 A small number of works that study the Imperial Council as an institution concentrate mostly on its political and financial functions and repeat the sketchy information about its judicial functions and personnel. We are know very little about how the hearings were held or how the petitions were handled in the Imperial Council. See, Mehmet İpşirli, "The Central Administration," in *History of the Ottoman State, Society & Civilization*, ed. Ekmelettin İhsanoğlu (Istanbul: Research Centre For Islamic History, Art and Culture, 2001); Ahmet Mumcu, *Hukuksal ve Siyasal Karar Organı Olarak Divan-ı Hümayun* (Ankara: [Ankara Üniversitesi, Hukuk Fakültesi], 1976); İsmail Hakkı Uzunçarşılı, *Osmanlı Devletinin Merkez ve Bahriye Teşkilatı* (Ankara: Türk Tarih Kurumu Basımevi, 1988); Feridun Emecen and İlhan Şahin, *Osmanlılarda Divan, Bürokrasi, Ahkam/ Ahkam Defteri (II. Beyazid Dönemine Ait 906/ 1501 Tarihli*) (Istanbul: Türk Dünyası Araştırmaları Vakfı, 1994). Emel Soyer's master's thesis, which tracks the transformation of *Mühimme* Registers of the Imperial Council during the seventeenth century, reveals valuable information on penal practices in the Imperial Council. See Emel Soyer, "XVII. yy. Osmanlı Divan Bürokrasisi'ndeki Değişimlerin Bir Örneği Olarak Mühimme Defterleri" (MA thesis, Istanbul Üniversitesi, 2007). R. Gradeva's works on the judicial system using the same (*Mühimme*) registers correspond to Sofia court records for the seventeenth century and bring to light many important facts about the workings of the Imperial Council as a judicial center. See Rositsa Gradeva, "On Judicial Hierarchy in the Ottoman Empire: The Case of Sofia, Seventeenth—Beginning of Eighteenth Century," in *Dispensing Justice in Islam: Qadis and Their*

records were rarely analyzed as distinct socio-legal institutions that could be utilized in order to understand their social, political, and cultural dynamics.[22] As a result, there remains a huge gap in our knowledge of the most basic information on the workings of these institutions.

In writing social history the study of legal documents requires not only a well-established database on the workings of these institutions, but also a meticulous awareness of the mediated, fabricated, textual, and therefore constructed character of the legal documents. In other words, rather than being transparent mirrors of reality,[23] these legal documents constructed "reality" through their language and their narration of the event, through the power dynamics involved in their production, and through the legal framework in which they operated.[24] By focusing on legal practices as a "contested domain"

Judgements, ed. Muhammad Khalid Masud, Rudolph Peters, and David Stephan Powers (Leiden and Boston: Brill, 2006); *Rumeli under Ottomans*. Tamdoğan who worked on the grand vizier's Wednesday *divan* of the Imperial Council revealed the judicial hierarchy between the Imperial Council and the Üsküdar court in the eighteenth century. See Işık Tamdoğan, "Sulh and the 18th Century Ottoman Courts of Üsküdar and Adana," *Islamic Law and Society* 15 (2008); Tamdoğan, "Qadi, Governor and Grand Vizier. Sharing of Legal Authority in 18th Century Ottoman Society," *Annals of Japan Association for Middle East Studies* 27, no. 1 (2011). Baldwin's recent work on dispute resolution in late seventeenth/early eighteenth-century Ottoman Egypt constitutes the most comprehensive study of local and imperial councils in the field. See James E. Baldwin, "Islamic Law in an Ottoman Context;" "Petitioning the Sultan in Ottoman Egypt," *Bulletin of the School of Oriental and African Studies* 75, no. 3 (2012). Yet, we still have nothing on the Ottoman Imperial Council equivalent to Nielsen's work on *mazalim* courts. See Jørgen S. Nielsen, *Secular Justice in an Islamic State: Mazalim under the Bahri Mamluks, 662/1264–789/1387* (Leiden: Nederlands Historisch-Archaeologisch Instituut te Istanbul, 1985).

22 It is impossible to review all the studies on Ottoman court records in order to determine their meticulousness or inattentiveness to the institutional dynamics of the courts and court records because of the extensive number of these studies. Yet, for a comprehensive historiographical review of the reasons behind such neglect and on the issue of the *shari'a* court as a distinct socio-legal institution and its suffering from "disciplinary orphanhood" see Agmon and Shahar, "Theme Issue," 3–15.

23 Dror Ze'evi, "The Use of Court Records as a Source of Middle Eastern Social History: A Reappraisal," *Islamic Law and Society* 5 (1998), 37; Agmon and Shahar, "Theme Issue," 12.

24 For some of the studies that approach court records with such a constructivist perspective, see Zouhair Ghazzal, *The Grammars of Adjudication: The Economics of Judicial Decision Making in Fin-de-siècle Ottoman Beirut and Damascus* (Beirut: Institut Français du Proche-Orient, 2007); Peirce, *Morality Tales*; Peirce, "Seniority, Sexuality, and Social Order: The Vocabulary of Gender in Early Modern Ottoman Anatolia," in *Women in the Ottoman Empire, Middle Eastern Women in the Early Modern Era*, ed. Madeline C. Zilfi (Leiden, New York, and Cologne: Brill, 1997); Najwa al-Qattan, "Textual Differentiation in the Damascus

between institutions, society, and individuals,[25] the analysis of a social phenomenon such as illicit sex, requires the repeated deconstruction of the legal language, institutions, and actors, as well as the normative legal forces, such as *shari'a* and *kanun,* involved in the production of a legal document.

The overlap of these two interrelated aspects in this socio-legal history requires that we have a comprehensive knowledge of the legal settings and that we deconstruct the legal documents themselves. As my archival research on petitionary registers, petitions, and the court records proceeded, I realized that in Ottoman studies we know very little about the institutional setting in which these documents were produced. The research process proved, for example, that it can take months to understand how someone from Ankara sent a petition to the Imperial Council; and understanding this is necessity before we can analyze why a petition in a sexual offense case was sent to the central government. Furthermore, one also realizes that the question of what "sexual crimes" were or how illicit sexuality was demarcated from the "licit" in eighteenth-century Anatolia cannot be answered without a thorough analysis of the discourse and terminology used in the various courts (both the Imperial Council and the local courts) in that specific period.

Finally, this study is eager to contribute to the re-conceptualization of Islamic law by incorporating legal documents of the central government, i.e., petitionary registers and petitions, as sources that reveal the socio-legal applications of Islamic law in parallel to the *kadı* court records. Scholars of Ottoman socio-legal history have so far concentrated on *kadı* court records and *fetva*s in order to see "law in practice." Since the *kadı* courts have long been perceived as the main and only venues in an Ottoman context in which *shari'a* and other legal forces were practiced, the students of court records have been unwilling to enlarge the framework. I hope that the legal-pluralistic perspective[26] that this study adopts by treating imperial law and council, imperial registers and petitionary documents as part of the applications of Islamic law will contribute to this re-conceptualization.

Sijill: Religious Discrimination or Politics of Gender?" in *Women, the Family, and Divorce Laws in Islamic History*, ed. Amira El Azhary Sonbol (Syracuse, NY: Syracuse University Press, 1997); Ergene, *Local Court, Provincial Society, and Justice*; Agmon, *Family & Court*; Beshara Doumani (ed.), *Family History in the Middle East Household, Property, and Gender* (Albany: State University of New York Press, 2003).

25 Hendrik Hartog, *Man and Wife in America: A History* (Cambridge, MA: Harvard University Press, 2000).

26 For a discussion of legal pluralism and the inter-relationship between different legal forums from a sociological perspective, see Ido Shahar, "Legal Pluralism and the Study of Shari'a Courts," *Islamic Law and Society* 15 (2008).

This study is also built upon a well-established body of literature that analyzes court practices in their spatio-temporal specificities to assess how gender was contested in areas of social mores and sexuality,[27] class hierarchies,[28] kinship,[29] family, and marriage, divorce, and property relationships.[30] However, we still know very little about how sexual and moral order was constructed in practice through various legal and social administrative techniques in the specific historical settings throughout the Ottoman lands. There are still a mere handful of studies on the applications used to ensure sexual and moral

27 Peirce, *Morality Tales*; Madeline C. Zilfi, "Women and Society in the Tulip Era, 1718–1730," in *Women, the Family, and Divorce Laws in Islamic History*, ed. Amira El Azhary Sonbol (Syracuse, NY: Syracuse University Press, 1996); Fariba Zarinebaf-Shahr, "Women and the Public Eye in Eighteenth Century Istanbul," in *Women in the Medieval Islamic World, Power, Patronage and Piety*, ed. Gavin R.G. Hambly (New York: St. Martin's Press, 1998); Peirce, "Seniority, Sexuality, and Social Order;" Amira El Azhary Sonbol, "Rape and Law in Ottoman and Modern Egypt," in *Women in the Ottoman Empire, Middle Eastern Women in the Early Modern Era*, ed. Madeline Zilfi (Leiden, New York, and Cologne: Brill 1997); Sonbol, "Adults and Minors in Ottoman Shari'a Courts and Modern Law," in *Women, the Family, and Divorce Laws in Islamic History*, ed. Amira El Azhary Sonbol (Syracuse, NY: Syracuse University Press, 1996); Elyse Semerdjian, "Gender Violence in Kanunnames and Fetvas of the Sixteenth Century," in *Beyond the Exotic: Women's Histories in Islamic Societies*, ed. Amira El Azhary Sonbol (Syracuse, NY: Syracuse University Press, 2005); Semerdjian, *"Off the Straight Path:" Illicit Sex, Law, and Community in Ottoman Aleppo* (Syracuse, NY: Syracuse University Press, 2008).

28 Nelly Hanna, "Sources for the Study of Slave Women and Concubines," in *Beyond the Exotic: Women's Histories in Islamic Societies*, ed. Amira El Azhary Sonbol (Syracuse, NY: Syracuse University Press, 2005).

29 Margaret Lee Meriwether, *The Kin Who Count: Family and Society in Ottoman Aleppo, 1770–1840* (Austin: University of Texas Press, 1999); Madeline C. Zilfi, "Thoughts on Women and Slavery in the Ottoman Era," in *Beyond the Exotic: Women's Histories in Islamic Societies*, ed. Amira El Azhary Sonbol (Syracuse, NY: Syracuse University Press, 2005).

30 For some examples of monographs and edited volumes that discuss these issues in relation to each other, see Agmon, *Family & Court*; Doumani, *Family History in the Middle East Household*; Amira El Azhary Sonbol (ed.), *Women, the Family, and Divorce Laws in Islamic History* (Syracuse, NY: Syracuse University Press, 1996); Judith E. Tucker, *Women in Nineteenth-Century Egypt* (Cambridge and New York: Cambridge University Press, 1985); Madeline C. Zilfi, ed. *Women in the Ottoman Empire, Middle Eastern Women in the Early Modern Era* (Leiden, New York, Cologne: Brill, 1997); Leslie Peirce, "'She is Trouble… and I Will Divorce Her:' Orality, Honor, and Representation in the Ottoman Court of 'Aintab," in *Women in the Medieval Islamic World, Power, Patronage and Piety*, ed. Gavin R.G. Hambly (New York: St. Martin's Press, 1998); Madeline C. Zilfi, *Women and Slavery in the Late Ottoman Empire: The Design of Difference* (New York: Cambridge University Press, 2010).

order under Ottoman rule in the various regions and periods.[31] The current study promises to enhance our understanding in this field by concentrating on specific forms of legal scrutiny in eighteenth-century Anatolia.

Islamic law categorizes any kind of sexual intercourse outside the bond of marriage, such as adultery, fornication, and any sexual assault as falling under the rubric of the all-encompassing and ambiguous term *zina*, which is defined as a crime.[32] Feminist scholars and others have made invaluable contributions by highlighting the gender implications of the ambiguities in Islamic law on the definitions of sexual offenses, and on the notions of consent and violence. For example, some scholars show that Islamic jurisprudence treats sexual

31 The most extensive monographs dealing particularly with illicit sex and morality are Peirce's work on sixteenth-century Aintab and Semerdjian's study on nineteenth-century Aleppo. See Peirce, *Morality Tales*; Semerdjian, *"Off the Straight Path."* For the later works of these authors on the subject, see Semerdjian, "Naked Anxiety: Bathhouses, Nudity, and the Dhimmi Woman in 18th-Century Aleppo," *International Journal of Middle East Studies*, no. 4 (2013); Leslie Peirce, "Abduction with (Dis)Honor: Sovereigns, Brigands, and Heroes in the Ottoman World," *Journal of Early Modern History* 15, no. 4 (2011). For the modern period, Kozma's work on sexuality, medicine, and the female body in late-nineteenth-century Egypt and Balsoy's work on reproduction policies on the female body in nineteenth-century Ottoman Empire should also be added to this list. Liat Kozma, *Policing Egyptian Women: Sex, Law, and Medicine in Khedival Egypt* (Syracuse, NY: Syracuse University Press, 2011); Gülhan Balsoy, *The Politics of Reproduction in Ottoman Society, 1838–1900* (London and New York: Routledge, 2013). Ze'evi's work discusses the change of sexual discourse in 1500–1900, mostly by revisiting secondary sources. Dror Ze'evi, *Producing Desire: Changing Sexual Discourse in the Ottoman Middle East, 1500–1900* (Berkeley: University of California Press, 2006). Apart from these examples, there are a couple of articles by Sonbol dealing in particular with gender and sexual violence in Egypt. See Sonbol, "Law and Gender Violence in Ottoman and Modern Egypt," in *Women, the Family, and Divorce Laws in Islamic History*, ed. Amira El Azhary Sonbol (Syracuse, NY: Syracuse University Press, 1996); "Rape and Law in Ottoman and Modern Egypt." A couple of other works in Ottoman studies touch upon the relationship between sexual regulations and public order, but either the issue does not constitute the main subject of the study or it does not investigate the social practices of sexual and public regulations through archival research. See Abdul Karim Rafeq, "Public Morality in 18th Century Ottoman Damascus," *La Revue du monde musulman et de la Méditerranée* 55–56 (1990); Zilfi, "Women and Society in the Tulip Era;" Zarinebaf-Shahr, "Women and the Public Eye;" Judith E. Tucker, *In the House of the Law: Gender and Islamic Law in Ottoman Syria and Palestine* (Berkeley: University of California Press, 1998); Başaran, *Selim III, Social Control and Policing in Istanbul*; Zarinebaf, *Crime and Punishment in Istanbul*.

32 Colin Imber, "*Zina* in Ottoman Law," in *Studies in Ottoman History and Law* (Istanbul: Isis Press, 1996).

rights as "property" by compensating victims of rape.[33] They also highlight the indifference of Islamic law to the notion of consent, especially where illicit sex is concerned.[34] They show that this indifference derived from the jurists' overriding concern with regulating reproduction and determining parentage and sexual property rights.[35]

Yet, we still know very little about the ways in which these gendered norms were exercised. Given the ambiguities and incoherencies of the definitions of sexual offenses in normative law, it is important to see how these ambiguities were dealt with "in practice." Although the Ottoman criminal code of Süleyman I in the sixteenth century expanded the definition of sexual crime (*zina*) by making amendments to the stringent requirements for evidence assigned by Islamic law and by categorizing new sexual offenses, the ambiguities of and the contradictory prescripts for sexual offenses persisted.[36] Nevertheless, Peirce's comprehensive work on the court records of sixteenth-century Aintab demonstrates that incoherencies in penal law opened the door for more flexible interpretations on the part of local judges during the period of empire consolidation in the sixteenth century, when the imperial power was trying to establish and popularize its rather new law court system.[37] Yet, this flexible interpretation of criminal law on sexual offenses seems to have led toward intervention and control in the eighteenth century. My study attempts to demonstrate that the ambiguities of normative Islamic law reinforced the judicial and punitive discretionary authority of the imperial political power over both the local courts and sexual and public order in eighteenth-century Anatolia.

Clearly, because this book explores public order in Ottoman society through sexual crimes, gender has a crucial place in the socio-legal historical analysis undertaken here. This study is inspired by feminist literature that approaches gender as "a primary way of signifying relationships of power,"[38] where gender categories are considered historical and temporal constructs rather than

33 Tucker, *In the House of the Law*; Sonbol, "Rape and Law in Ottoman and Modern Egypt;" Leslie Peirce, "Rape: The Ottoman Empire," in *Encyclopedia of Women and Islamic Cultures*, ed. Suad Joseph (Leiden: Brill, 2008).

34 Devin J. Stewart, Baber Johansen, and Amy Singer, *Law and Society in Islam* (Princeton, NJ: Markus Wiener Publishers, 1996).

35 Tucker, *In the House of the Law*; Sonbol, "Rape and Law in Ottoman and Modern Egypt."

36 Uriel Heyd, *Studies in Old Ottoman Criminal Law*, ed. V.L. Ménage (Oxford: Clarendon Press, 1973); Peirce, *Morality Tales*; Dror Ze'evi, "Changes in Legal-Sexual Discourses: Sex Crimes in the Ottoman Empire," *Continuity and Change* 16, no. 2 (2001).

37 Peirce, *Morality Tales*.

38 Joan Scott, *Gender and the Politics of History* (New York: Columbia University Press, 1988), 42–43.

fixed universals.[39] In this sense, it is built upon the premise that the sexual sphere was one of the primary arenas in which social conflicts and power struggles were articulated in the eighteenth century. This study examines legal processes as sites of encounters and negotiations over gender norms between the Ottoman state and its subjects. Normative formulations of illicit sexuality were contested within this institutional framework. Thus, here I tell the story of the institutional history of the discursive construction of illicit sex in eighteenth-century Ottoman Anatolia, more than the story of how Ottoman men and women experienced their sexuality at a certain time or place. To this end, deciphering gender constructions of sexuality goes hand in hand in this project with decoding the legal system in the mid-eighteenth-century Ottoman Empire.

Yet, this study still emphasizes experience and subjectivity, and therefore does not adhere to the idea that individual actors are totally concealed under surveillance. Although Foucault's analysis of sexuality has been groundbreaking in elucidating the way in which sexuality has been disciplined through productive technologies of power in modern Western society,[40] his model of bio-power neglects the concept of subjectivity because it absorbs the individual historical actors into a universal social body in which surveillance techniques are inscribed. Scholars demonstrate how, historically, technologies of power in fact generated resistance in social practice.[41] Furthermore, Foucault's analysis neglects the gender dimension in the discourses on sexuality. Feminist historians also show empirically the way the discursive deployment of sexuality in nineteenth-century Europe contributed to the regulation of sexuality in favor of men with the exclusion of women from the public space through the "myth of rape," and through discourses on sexual danger.[42] In this study, by adapting Canning's definition of the body, I approach "subjectivity" both as a site of intervention and inscription of power through a legal and

39 Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (New York: Routledge, 1999).

40 Foucault, *The History of Sexuality*.

41 Khaled Fahmy, *All the Pasha's Men: Mehmed Ali, His Army, and the Making of Modern Egypt* (Cambridge and New York: Cambridge University Press, 1997); Judith R. Walkowitz, *Prostitution and Victorian Society: Women, Class, and the State* (Cambridge and New York: Cambridge University Press, 1980).

42 Anna Clark, *Women's Silence, Men's Violence: Sexual Assault in England, 1770–1845* (London and New York: Pandora, 1987); Ann Laura Stoler, *Race and the Education of Desire: Foucault's History of Sexuality and the Colonial Order of Things* (Durham, NC: Duke University Press, 1995); Judith R. Walkowitz, *City of Dreadful Delight: Narratives of Sexual Danger in Late-Victorian London* (Chicago: University of Chicago Press, 1992).

moral surveillance of sexuality, and as a site of contestation where gendered subjects encounter, embody, and resist these inscriptions through their experiences of sexuality.[43]

The silence of the legal documents on certain points gives us some idea about the discordance of and resistance to the legal scrutiny of the sexual order in the eighteenth-century Ottoman Empire. For example, the absence of any regular cases of adultery indicates that there were more personal and communal methods of dealing with this issue. As other researchers have also pointed out, there is enough evidence in the Ottoman court records to show that in many criminal cases, including sexual disputes, people solved their problems through mutual agreement (*sulh*) or private prosecution outside the courts.[44] Even though in the Ottoman legal system local administrators had the authority to inform the court of suspected cases of sexual offenses, it is not difficult to imagine that these administrators might have been incorporated into private solutions outside the court if the community so wished. As this study demonstrates through multiple instances, the community, as watchman, played an important role in drawing the boundaries of the illicit; without their participation legal surveillance would have been impossible in an early-modern society.

With such an awareness of all the possibilities of resistance to legal scrutiny, this study argues, based on a meticulous observation of legal and penal processes, that in mid-eighteenth century Ottoman Anatolia a centripetal politico-administrative jurisdiction of crime and punishment was able to more strictly scrutinize sexual and moral order by employing existing mechanisms of control and by developing new ones. The social surveillance of sexuality by the community and the co-existing "discretionary authority" of the Ottoman state over sexual crimes were deployed through a relatively newly promoted and more bureaucratized system of petitioning, a more hierarchical judicial review mechanism, and finally, a more centrally organized penal system that enabled the surveillance of and punishment for sexual crimes to be carried out in a closer manner by the state in mid-eighteenth-century Ottoman Anatolia. Within this sexual and moral order, it seems that the "protection of honor"

43 Kathleen Canning, *Gender History in Practice: Historical Perspectives on Bodies, Class & Citizenship* (Ithaca, NY: Cornell University Press, 2006), 168–189.

44 This issue is discussed in more detail in later chapters. For recent studies on amicable settlement, see Tamdoğan, "Sulh and the 18th Century Ottoman Courts of Üsküdar and Adana," and Aida Othman, "And the Sulh is Best: Amicable Settlement and Dispute Resolution in Islamic Law" (PhD diss., Harvard University, 2005); Boğaç A. Ergene, "Why Did Ummu Gulsum Go to Court—Ottoman Legal Practice between History and Anthropology," *Islamic Law and Society*, no. 2 (2010). Ergene's study shows that amicable settlement was used as a dispute resolution method in court as well.

began to dominate the legal discourse on sexuality and morality, and thus redefine the relationship between the Ottoman state and its subjects in moral terms.

Precisely because of its institutional focus, this study concentrates mainly on the interaction between three types of records: The Anatolian Registers of Imperial Rescripts (Anadolu *Ahkam Defterleri*), petitions of the Ottoman subjects, and the *kadı* court records of two major Anatolian towns, Ankara and Bursa. I have also enhanced my analysis of the interactions between different legal records by consulting the *fetva* collections of the mid-eighteenth century and *kal'abend*[45] registers of the Imperial Council that consisted of imperial rescripts for the imprisonment and/or banishment of those convicted.

The series of Anatolian Registers of Imperial Rescripts in the Prime Ministry Ottoman Archives in Istanbul contains one hundred and eighty-six volumes for the period from 1742 to 1889. These registers are composed of the imperial rescripts written by the Imperial Council addressing the provincial judges and governors in response to petitions and letters concerning disputes and issues of the Ottoman subjects in the Anadolu province. This study examines two volumes of these registers, volumes that cover the period between 1742 and 1744; the first one is composed of 284 pages containing 1,254 imperial rescripts and the second is 292 pages containing 1,248 rescripts. Since a diverse array of issues was submitted to the Imperial Council by Ottoman subjects, these registers are very rich in content and cover a variety of social and economic issues, such as property, inheritance, and debt disputes, as well as various criminal disputes including cases of murder and serious sexual crimes as well as incidents of simple theft and slander.

Despite the richness of their content, the petitionary registers of the Imperial Council have scarcely been studied as a whole, either to analyze social and economic history or to explore the judicial functions and relationships of the Imperial Council.[46] First, these registers promise to be invaluable sources for the further scrutiny of the functioning of the Ottoman legal system. They give us invaluable clues on the interaction between the central and provincial governments, since each imperial rescript reveals information about the judicial

45 Confinement in a fortress.

46 An exception to this is Faroqhi's analysis of the mid-eighteenth-century petitions of Ottoman guildsmen from Anatolia, Karaman, and Istanbul, in which she uses the petitionary registers of these provinces. See Faroqhi, "Guildsmen Complain to the Sultan." Zarinebaf's study on crime and punishment in eighteenth-century Istanbul also uses some *şikayet* (petition) registers as part of her analysis of petitioning. See Zarinebaf, *Crime and Punishment in Istanbul*.

and administrative authorities in the provinces where the cases originated. Furthermore, as they are relatively more tangible sources compared to the scattered registration of imperial rescripts in previous periods, they constitute fruitful written sources of regional and local history from the mid-eighteenth century onwards. Finally, the rich variety of criminal disputes these sources offer has provided me with an analytical tool for an investigation of the Ottoman state's involvement in the legislation on and penalizing of sexual offenses. The only handicap to using these registers is that it is very difficult to grasp the details of the dispute and the imperial orders since they are only summaries of the petitions and the orders. As I discuss in detail throughout the book, the rescript generally forwards the dispute to the local judge for his resolution of the case, often without instructions.

Petitions submitted by Ottoman subjects to the Imperial Council are also colorful and exceptional sources of social history. Even though petitions were not drafted by a state official following various stages of mediation and representation, as happens with court records and imperial rescripts, they were still mediated by semi-official professional petition writers. In this context, the petitioner's request was translated into a highly professionalized and rhetorical language. Yet, petitions still constitute unique sources; they offer moments in which the researcher can approach—and almost hear—the historical subject. Furthermore, an analysis of this rhetorical language and of the content of the petitions, as well as of the actors involved in the petition, provides us with unparalleled information on social and legal affairs. Petitions—as well as the Imperial Council registers—accord the researcher an additional advantage: they provide valuable information about the experiences of non-Muslim subjects in the empire because their religious leaders, and they themselves, contacted the central government more often than they utilized the local *kadı* courts, although they had their own community courts. This exceptional source has received almost no attention in studies on Ottoman history despite the fact that it has been widely utilized by researchers of European history.[47] In this study I introduce petitions as a valuable source for historical analysis in Ottoman studies.

47 For two exceptions using actual petitions in Ottoman studies, see Baldwin, "Islamic Law in an Ottoman Context;" Baldwin, "Petitioning the Sultan in Ottoman Egypt," and Milen V. Petrov, "Everyday Forms of Compliance: Subaltern Commentaries on Ottoman Reform, 1864–1868," *Comparative Studies in Society and History* 46, no. 4 (2004). For an excellent example of the use of petitions for a social analysis in European history, see Natalie Zemon Davis, *Fiction in the Archives: Pardon Tales and Their Tellers in Sixteenth-Century France* (Stanford, CA: Stanford University Press, 1987). Also see the articles on petitions in the special issue of *International Review of Social History* 46, Supplement S9 (2001).

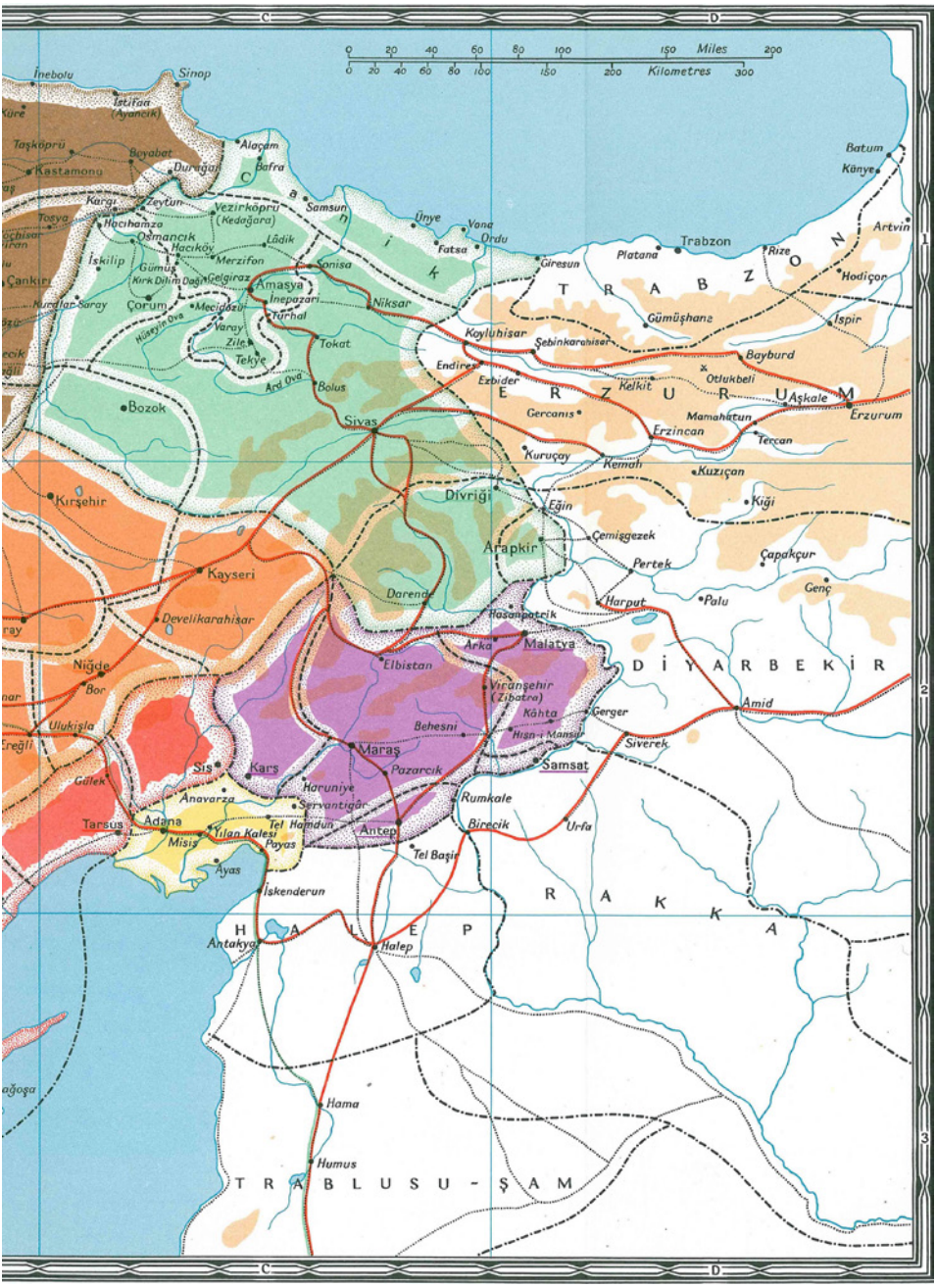
Like the registers of imperial rescripts, petition folders (A.DVN.ŞKT) collected in *Şikayet Kalemi Belgeleri* in the Prime Ministry Archives also start in 1742. By 1767, the number of folders had reached 977. For the purpose of this study, I have selected and analyzed eleven folders from the period between 1742 and 1744, each composed of approximately 125 petitions.[48] These folders combine the petitions of Ottoman subjects from all over the empire although petitions coming from the "core provinces" of the empire—Thrace and the western half of Anatolia—constitute the majority. Therefore, I extracted those petitions from the province of Anadolu. However, I used petitions from other Anatolian towns as well, when they constituted a relevant example for comparison.

I studied three volumes of Ankara court records and two volumes of Bursa court records covering the period from 1741 to 1745. *Kadı* court records are, in many respects, invaluable sources for my study. First, they provide very rich and relatively detailed data—compared to petitionary registers—for an understanding of local social and gender dynamics. They include a variety of criminal cases and judicial verdicts, though it is often not possible to see the sentence in criminal disputes. Finally, they provide us with plenty of information about administrative and legal practices because they also contain records of the imperial orders addressed to the judges and administrators of particular towns.

As for supplementary sources, I conducted an examination of three major *fetva* collections (the compilations of the legal opinions of the chief muftis) from the eighteenth century, in order to explore the connection between the theory and practice of Islamic law. These *fetva* collections are the *Behcetü'l-Fetava*, *Tuhfetü'l-Fetava*, and *Neticetü'l-Fetava*. These three collections are compilations of the legal opinions of many important chief muftis of the eighteenth century; including those of Feyzullah Efendizade es-Seyyid Mustafa who served as chief mufti during the period I studied, from 1736 to 1745, and of Yenişehirli Abdullah who occupied the office from 1718 to 1730 and whose *fetva*s were very influential in the decades that followed. Since *fetva*s give the legal reasoning of muftis faced with practical questions arising from daily experience (that is, they are not treatises based on independent theological reasoning), they embody the mutability of Islamic jurisprudence according to political and social conjunctures. Therefore, analyzing the major eighteenth-century *fetva* collections provides an important jurisprudential perspective on sexuality and on the political power's discretionary judgment over social order. Finally, I include a volume of *kal'abend* registers of the Imperial Council covering the period from 1743 to 1745 in order to analyze sexual offenses penalized by imprisonment and/or banishment. Such a multiplicity of sources enables us to explore, on the one

48 For a detailed discussion of these folders, see Chapter 2.

MAP 0.1 *Ottoman Anatolia in the mid-17th century.*
PITCHER, DONALD EDGAR, *AN HISTORICAL GEOGRAPHY OF THE OTTOMAN EMPIRE*, (LEIDEN: BRILL, 1972), MAP XXV.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İnebolu
Sinop
İstifaa (Ayancik)
Taşköprü
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Durağan
Alaçam
Bafra
Kastamonu
Karga
Zeytun
Vezirköprü (Kedağara)
Samsun
Ünye
Vona
Ordu
Fatsa
Giresun
Batum
Künye
Artvin
Rize
Hodiçon
Trabzon
Platana
Tosya
Hacihamza
Osmancık
Hacıköy
Lâdik
İskilip
Gümüş
Kırk Dilim Dağı
Merzifon
Sonisa
Gelgiraz
Çankırı
Amasya
Inepazari
Niksar
Çorum
Mecidözü
Türhal
Varay
Zile
Tekye
Tokat
Gümüşhane
İspir
Kayluhisar
Şebinkarahisar
Bayburd
Endires
Ezbider
Kelkit
Otlukbeli
Aşkale
Erzurum
Gercanis
Mamahatun
Erzincan
Tercan
Bozok
Siyas
Bolus
Kuruçay
Kemah
Kuzuçan
Kiği
Kirşehir
Divriği
Eğin
Çemişgezek
Arapkir
Pertek
Çapakçur
Genç
Palu
Harput
Kayseri
Develikarahisar
Darende
Hasançelebi
Arka
Malatya
Elbistan
Viranşehir (Zibatra)
Kâhta
Gerger
Amid
Niğde
Bor
Ulukişla
Behesni
Hısn-i Mansur
Siverek
Maraş
Pazarcık
Samsat
Sis
Kars
Gülek
Havuniye
Anavarza
Servantigar
Rumkale
Birecik
Urfa
Tarsus
Adana
Tel Hamdun
Antep
Misis
Yılan Kalesi
Payas
Tel Başir
Ayas
İskenderun
Antakya
Halep
Hama
Humus
TRABLUSU-ŞAM

hand, the various layers of institutional workings and networking of the legal system, and, on the other hand, minute details of the subject positions.

The geographical scope of this study is limited to Ottoman Anatolia for several reasons. The province (*eyalet*) of Anadolu, that is, the western part of today's Anatolia, Kütahya being its capital in the eighteenth century, was a "core" province of the empire.[49] (See Map 0.1) It was a particularly appropriate locale, as it is relatively close to Istanbul and this allowed for more frequent and easier communication with the imperial center. This resulted in a higher number of petitions to the imperial center by the Anatolian people and thus provided me with rich data to work on.[50] In quantity, the Anatolian Registers of Imperial Rescripts and the petitions sent by the people of Anatolia exceed those of many other provinces. While this relative abundance of documents provides an opportunity to trace the interaction between judicial and administrative authorities, one should not forget that the legal scrutiny of the state observed in this relatively intense interaction is specific to the region of Anadolu and therefore conclusions about this area cannot necessarily be applied to other parts of the empire.

In order to make a nuanced analysis of the legal administration of sexual crimes in Anatolia, I selected the court records of two Anatolian towns, namely Bursa and Ankara, for this research. The purpose in analyzing the court records of these towns is not to write their social histories, but rather to situate them in a larger socio-legal picture of the administration of sexual crimes. In this sense, this study is not interested in the local histories of these localities, but in their capacity to represent multiple aspects of an Anatolian town. Thus, I have chosen these towns, not only because of their position in different regions of the Anatolian province (western Anatolia), but also because of their location

49 For more detailed information on Anatolia as a geographical region and as an administrative province in the Ottoman Empire between the fifteenth and the eighteenth centuries, see F. Taeschner, "Anadolu," in *Encyclopaedia of Islam, Second Edition*, ed. B. Lewis, Ch. Pellat, and J. Schacht (Brill, 1960). For administrative, socio-economic and cultural life in Anatolia during Ottoman times, see Mehmet İpşirli et al., "Anadolu," in *TDV İslam Ansiklopedisi* (Istanbul: TDV Yayınları, 1991).

50 Although it is almost impossible to give percentages of the petitions coming from the Anatolian province compared to those from the others without scanning all the available petitions after 1742 in BOA, comparing the available numbers and the years covered by each *Ahkam* register gives us an idea. For example, while there is only one register covering the years between 1742 and 1750 and a total of 9 registers until 1878 for the province of Adana, there are 18 registers for the same period and total number of 185 registers until 1889 for the province of Anadolu. Rumelia registers that are the second most dense in terms of data, have less than half of the quantity of the Anadolu registers.

at some distance from Istanbul where the Imperial Council resided. This point has been particularly important, as it has enabled me to observe the relationship of Ottoman subjects of the provinces with the central government.

During most of the Ottoman period Bursa and Ankara had important political and commercial connections to Istanbul. Both were significant administrative and economic centers in the eighteenth century. Bursa had always been—during the eighteenth century and before—a colorful and prosperous center. Not only was it the first capital of the Ottoman Empire (1327–1402) but it was also the capital city of the sub-province (*sancak*) of Hüdavendigar during Ottoman rule. It was an international center of the silk and cotton trade and industry thanks to its proximity to international trade routes and to Istanbul; and it was a multi-ethnic and multi-religious city with a population consisting of Muslims, Greeks, Armenians, and Jews.[51] Ankara was also an important administrative and economic center, being the first capital of the province of Anatolia until Kütahya took over this function in 1451; and it became the capital city of the sub-province of Ankara in the Ottoman period. It was an important international and regional center for the production and trade of angora and woolen cloth (*sof*), and it was also a multi-ethnic religious center with a population composed of Muslims, Armenians, Greeks, and Jews.[52] As for administrative and judicial status, by the eighteenth century both Bursa and Ankara were already among the highest ranking judicial districts (*mevleviyet*). In the period studied here, the administrative and judicial governance of these two towns were assigned by the central government to high level religious and

51 For more information on Bursa and its importance in the history of the Ottoman Empire, see Halil İnalcık, "Bursa," in *Encyclopaedia of Islam, Second Edition*, ed. P. Bearman, et al. (Brill Online, 2009); "Bursa," in *TDV İslam Ansiklopedisi* (Istanbul: TDV Yayınları, 1992); Feridun Emecen, "Hüdavendigar," in *TDV İslam Ansiklopedisi* (Istanbul: TDV Yayınları, 1998); Haim Gerber, *Economy and Society in an Ottoman City: Bursa, 1600–1700* (Jerusalem: Hebrew University, 1988); Nurcan Abacı, *Bursa Şehri'nde Osmanlı Hukuku'nun Uygulanması (17. Yüzyıl)* (Ankara: Kültür Bakanlığı 2001).

52 For more information on Ankara in various periods under Ottoman rule, see F. Taeschner, "Ankara," in *Encyclopaedia of Islam, Second Edition*, ed. P. Bearman, et al. (Brill Online, 2009); Rifat Özdemir, *XIX. Yüzyılın İlk Yarısında Ankara: Fiziki, Demografik, İdari, ve Sosyo-Ekonomik Yapısı, 1785–1840* (Ankara: Kültür ve Turizm Bakanlığı, 1986); Hülya Taş, *XVII. Yüzyılda Ankara* (Ankara: Türk Tarih Kurumu Yayınları, 2006); Musa Çadırcı, "Yönetim Merkezi Olarak Ankara'nın Geçirdiği Evrim," in *Tarih İçinde Ankara, Eylül 1981 Seminer Bildirileri*, ed. Erdal Yavuz Ümit and Nevzat Uğurel (Ankara: ODTÜ, 1984); Suraiya Faroqhi, "Ankara ve Çevresinde Arazi Mülkiyetinin ya da İnsan-Toprak İlişkilerinin Değişimi," in *Tarih İçinde Ankara, Eylül 1981 Seminer Bildirileri*, ed. Erdal Yavuz Ümit and Nevzat Uğurel (Ankara: ODTÜ, 1984); Rifat Özdemir, "Ankara," in *TDV İslam Ansiklopedisi* (Istanbul: TDV Yayınları, 1991).

vizierial bureaucrats as a revenue source. This meant that the holders of these appointments generally did not go and stay at their place of office, but rather appointed deputies on their behalf (lieutenant-governor or deputy-judge). Such practices contributed to the localization of provincial government explained in this study.

The body of this study is composed of five chapters. The first chapter outlines the historical context in which Ottoman imperial law operated in the mid-eighteenth century. While discussing the changes which took place in the economic and social configuration of the empire during the late seventeenth and early eighteenth centuries, this chapter specifically interrogates the status of *kanun* (imperial law) in the eighteenth century. By concentrating on imperial decrees and petitions from the mid-eighteenth century rather than on searching for a codified source of *kanun*, this chapter demonstrates that, contrary to mainstream arguments about its decay, the *kanun* was still a prevailing force as an amalgam of certain legal practices and institutions in the mid-eighteenth century, and it was utilized as an important tool in the construction of both ideal and real moral order.

In Chapter 1 I probe the historical bases of Ottoman political discretion over public order by reviewing Islamic theory, which concedes judicial prerogative over public order to the Muslim sovereign, and by summarizing the sultanate's implementation of this prerogative through law books during the sixteenth century, and I demonstrate how this prerogative was deployed in a different socio-political setting in the eighteenth century. At this time, the central administration underwent a transformation toward an oligarchic rule while the provincial governments shifted toward the regional politics of the local elite as a result of the new redistributive economic policies. This chapter argues that these transformations altered the shape of the *kanun*, which then became a more flexible amalgam of legal and archiving practices of different legal institutions in the eighteenth century.

Chapter 2 explores the phenomenon of petitioning in mid-eighteenth-century Anatolia as an important juncture in which the central government's concerns about scrutinizing public order in the provinces converged with Ottoman subjects' strategies to maneuver and engage in social and political power struggles through alternative legal means. By specifically interrogating the reasons Ottoman subjects petitioned the Imperial Council to resolve their local disputes, including many sexual offense cases, this chapter provides a detailed account of the people's utilization of the local *kadı* courts, governor's councils, and the Imperial Council, alongside the office of the chief mufti. It also demonstrates that the proliferation and diversification of the petitionary registers of the Imperial Council that gained bureaucratic momentum in the

mid-eighteenth century apparently enabled the central administration, through these petitions, to scrutinize the local power holders. Since the boundaries between those local power holders were blurred as a result of the incorporation of local notables and local power brokers, such as "bandit"-mercenaries, into the provincial government, the central administration seems to have utilized petitioning as a way to watch over local events in the mid-eighteenth century.

In Chapter 3 I undertake a deeper analysis of the utilization of petitioning in cases of sexual violence. I note an overlap between "banditry" and "sexual violence" in the petitions from Anatolia and explore the symbolic as well as legal significance of sexual violence in cases of excessive violence or habitual criminality, i.e., banditry. By examining the term "violation of honor" (*hetk-i ırz*), which was frequently utilized by petitioners and the central government, I finally discuss how, by the mid-eighteenth century, the establishment of sexual order and the protection of the "honor" of Ottoman subjects had become an overall legitimizing concept in the legal discourse regulating the relationship between the Ottoman state and its subjects.

In Chapter 4 I focus on the legal and social scrutiny of sexual crimes in mid-eighteenth-century Anatolia and look at the "court" as a gendered space. To this end, I develop a taxonomy of sexual offenses as they appeared in legal practice in mid-eighteenth-century Anatolia. I survey definitions and categories of "illicit" sex in the *kadı* court records of Ankara and Bursa as well as in the petitionary records of the Imperial Council. This chapter establishes a genealogy of the terms used in legal practice, especially of "indecent act(s)" (*fi'l-i şeni'*), and various other expressions that connoted sexual transgression, by investigating their historical and legal relationship within different legal entities such as the *kanun*, Islamic jurisprudence, and *fetva*s. I investigate the fact that legal practice proliferated the definitions and categories of sexual crimes by not defining sexual offenses in strictly *shari'a*-driven terms such as *zina*, even though it also played down people's experiences through its use of euphemistic expressions. This chapter reveals that in the eighteenth century there was a tendency in the courts to replace the most commonly used term for sexual offenses in Islamic jurisprudence, *zina*, with *fi'l-i şeni'*. This tendency, I argue, might be a reformulation of the old practice of discretionary jurisdiction of the Ottoman political power over sexual crimes.

Chapter 5 explores the outcomes of such categorizations in penalizing sexual offenses in eighteenth-century legal practice. In other words, how, under the established categories of sexual offenses, was sexual and moral order instituted by punishing sexual deviance. After reviewing the issue of the rarity of punishments being recorded in the court verdicts, and the alternative means of tracking punishments through legal documents, this last chapter primarily

examines the penal structure of the eighteenth-century judicial system. In Chapter 5, I consider appellate and judicial review mechanisms in legal practice, and note that the exploration of punishments inflicted for various sexual offenses illustrates how political power deployed its age-old jurisdictional right of "discretion" in penalizing sexual offenses in a more centrally scrutinized execution of punishment in eighteenth-century Ottoman Anatolia. I argue that this centripetal scrutiny of the penal enforcement of sexual and moral order reflects the fact that sexual deviance, and especially sexual violence, signified a disturbance of public and gender order, one that was increasingly perceived by the Ottoman state as an assault on its honor and legitimacy.

CHAPTER 1

Social and Legal Order in the Eighteenth Century

The eighteenth century has an identifiable starting point, one with important political and social connotations for the transformations that took place in the following years. The Treaty of Karlowitz in 1699 is considered a landmark of imperial defeat and social unrest, and thus the beginning of the eighteenth century as a new era. The treaty represented more than a military defeat of the Ottomans by a Western coalition let by Austria, it was also a political recognition of the loss of imperial control over its territories and subjects. The 1703 rebellion against Mustafa II and his *şeyhülislam* Feyzullah was in fact an expression of larger popular unrest that resulted from the losses and humiliation of the Ottomans by the Treaty of Karlowitz.[1] Yet, rebels were still loyal to the ideals of the state, the rule of law, and the power of the *shari'a*.[2] Although they did not ask for a regime change, landholders and military groups received dispensations and compensation from the government.

On the one hand, the uprisings of Patrona Halil in 1730 and that of the Albanian immigrants in the *sipahi* bazaar in 1740 in Istanbul were outcries for the re-establishment of the old order, that is, the re-establishment of the privileges of the Muslim majority against non-Muslims and foreign traders in the market and the abolishment of war taxes.[3] The reform agenda of the coalition of Janissaries and the *ulema* in opposition to the sultanic forces (i.e., the coalition between the sultan and the grand vizier), can be interpreted in terms of its ideals of establishing the old political order and *shari'a* as a conservative and religiously motivated movement.[4] On the other hand, the coalition's economic class interests, with the integration of the Janissaries into the market economy as artisans and shopkeepers and the transformation of the *ulema* into the most important contractors and sub-contractors of tax-farming in Istanbul and the provinces, favored the establishment of a new order in which these new economic actors had a voice in the constitution of politics.[5]

1 Barkey, *Empire of Difference*, 212.

2 Rifa'at Ali Abou-El-Haj, *The 1703 Rebellion and the Structure of Ottoman Politics* ([Leiden]: Historisch-Archaeologisch Instituut te Istanbul, 1984), 70–72. Barkey, *Empire of Difference*, 212.

3 Barkey, *Empire of Difference*, 217.

4 Ibid., 225.

5 Baki Tezcan's interpretation of *ulema* as the main actors of progressive forces that advocated for constitutionalism is addressed in more detail in the discussion of imperial law on the following pages. See Tezcan, *The Second Ottoman Empire*.

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FIGURE 1.1 *Portrait of Mahmud I.* Kebir Musavver Silsilenâme (c. 1720), *Levnî.* TOPKAPI PALACE MUSEUM LIBRARY, A 3109, FOLIO 24a.

Mahmud I's reign was a period in which the "old" started to establish an equilibrium with the "new." That is, the new actors in the market and those in politics started to normalize their positions without resorting to political revolt and dethronement.[6] Mahmud I (See Figure 1.1) was able to rule for twenty-four years without being overthrown, with the support of the *esnaf*, including Jews and Christians in Istanbul.[7] He paid special attention to the payment of janissary salaries during his reign; he was well aware of the political dangers that the dissatisfactions of a politically and socially engaged group can bring.

Particularly with the transformation of the ongoing fiscal reform of tax-farming into semi-hereditary and privatized lifelong tax-farming, some of the forces in these diverse coalitions of the imperial center, either *ulema* or the vizierial households, became agents who actively advocated the localization of the provincial administration by contributing to the establishment of local notable entrepreneurs through tax-farming.[8] Mahmud I's reign (1730–54) was an era in which those hereditary dynasties took root in the provinces. Already by the late seventeenth century, minor vizierial and *ulema* households started to consolidate their prominence in Istanbul, and in the provinces, they transferred their assets through hereditary endowments and administrative positions.[9] The complex phenomenon of "banditry" as defined by the central administration before and during the eighteenth century, the phenomenon which I address by examining legal documents, was a long-lasting result of this localization of politics and the military, which was, in turn, a consequence of using peasants as mercenary troops with the monetization and privatization of finances of the state and the army.[10]

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6 See Robert W. Olson, "The Esnaf and the Patrona Halil Rebellion of 1730: A Realignment in Ottoman Politics?" *Journal of the Economic and Social History of the Orient* 17, no. 3 (1974): 329–344; Ariel Salzmann, "The Age of Tulips: Confluence and Conflict in Early Modern Consumer Culture (1550–1730)," in *Consumption Studies and the History of the Ottoman Empire*, ed. Donald Quataert (Albany: State University of New York Press, 2000), 96–97.

7 For the relationship of the Jewish artisans with the Ottoman administration, see Robert W. Olson, "Jews in the Ottoman Empire in Light of New Documents," *Jewish Social Studies* 41, no. 1 (Winter 1979), 79; Olson, "Jews, Janissaries, Esnaf and the Revolt of 1740 in Istanbul: Social Upheaval and Political Realignment in the Ottoman Empire," *Journal of the Economic and Social History of the Orient* 20, no. 2 (1977).

8 For a recent study on the localization of government, see Ali Yaycıoğlu, "Provincial Power-Holders and the Empire in the Late Ottoman World: Conflict or Partnership?" in *The Ottoman World*, ed. Christine Woodhead (London: Routledge, 2012).

9 Suraiya Faroqhi, "Introduction," in *The Cambridge History of Turkey: The Later Ottoman Empire, 1603–1839*, ed. Suraiya Faroqhi (New York: Cambridge University Press, 2006), 14–16.

10 For a recent study on banditry and its transnational aspects in late eighteenth-century Rumelia, see Tolga Esmer, "A Culture of Rebellion: Networks of Violence and Competing Discourses of Justice in the Ottoman Empire, ca. 1790 to 1808" (PhD diss., University of

On the one hand, long periods of war with Venice (1714–18), Austria (1716–18, 1739), Russia (1735–38), and Iran (1722–27, 1730–35, 1743–46) strained both the Ottoman state and the subjects in the first half of the eighteenth century. The human effect of war on the Anatolian people was tremendous. Ariel Salzmann highlights the overwhelming prevalence of rural insecurity during the first half of the eighteenth century in the region of Amid; it reached such an extent that the numbers of villages and tax fiefs decreased dramatically as a result of the lack of security and the raids on villages and lands by the tribes.[11] Though one of the motives behind the introduction of the establishment of lifelong tax farms was to revitalize agriculture in the empire, Anatolia did not benefit from this transformation significantly, because of the social and economic deterioration of the rural landscape. Agricultural lands in Anatolian provinces were not initially included in the auctions for tax farms because the authorities thought that they would not attract bidders. Even if there existed some, investments were rarely on rural lands. Only 5 percent of the available tax farm investments in western Anatolia were in village lands.[12]

The constant collection of undisciplined units of irregular troops that resulted from the ongoing, seemingly endless wars transformed the Anatolian provinces into a "lair of brigands," as Silâhdar Fındıklılı Mehmed Agha articulated in his *Nusretname*.[13] In 1740, after the war with Austria and Russia and with the rise of the Iranian threat, demobilized irregulars re-emerged as troublemakers in Anatolia. Imperial decrees were issued in an attempt to suppress them; these specified that illegal or overt taxes should not be extracted from the Anatolian people, in order to protect Istanbul from another wave of immigration.[14] Nadir Shah's attacks on the eastern front between 1743 and 1746 triggered fear on the part of the central administration that "another rebellion might ensue, and new controls on public assembly… [might be]… introduced."

Chicago, 2009); Esmer, "Economies of Violence;" Esmer, "The Precarious Intimacy of Honor." For a discussion of epidemic violence and banditry in Anatolia during the seventeenth century, see Oktay Özel, *The Collapse of Rural Order in Ottoman Anatolia: Amasya 1576–1643* (Leiden: Brill, 2016).

11 Salzmann, *Tocqueville in the Ottoman Empire*, 133–135.

12 Ariel C. Salzmann, "Measures of Empire: Tax Farmers and the Ottoman Ancien Régime, 1695–1807" (PhD diss., Columbia University, 1995), 175–176; Caroline Finkel, *Osman's Dream: The Story of the Ottoman Empire, 1300–1923* (New York: Basic Books, 2007), 357.

13 Silâhdar, *Nusretnâme*, ed. İsmet Parmaksızoğlu, vol. 2 (Istanbul: Millî Eğitim Basımevi, 1962), 415, as quoted in Finkel, *Osman's Dream*, 357; Silâhdar Fındıklılı Mehmed Ağa, *Nusretnâme* ed. İsmet Parmaksızoğlu, vol. 2 (Istanbul: Milli Eğitim Basımevi, 1969), 415.

14 Finkel, *Osman's Dream*, 364; Yücel Özkaya, *XVIII. Yüzyılda Osmanlı Kurumları ve Osmanlı Toplum Yaşantısı* (Ankara: Kültür ve Turizm Bakanlığı Yayınları, 1985).

This fear was "relaxed only in 1746 when an Ottoman-Iranian peace treaty was at last achieved."[15]

On the other hand, the first half of the eighteenth century and the reign of Mahmud I was also a period of social and cultural revival and recovery. The cultural revival of architecture by Ahmed III that was commonly known as the "Tulip Age," continued in Mahmud's reign, but in a less ostentatious way.[16] Mahmud I was the sponsor of the first baroque mosque within the larger complex at the entrance of the Nuruosmaniye (known as the "covered bazaar"). The establishment of new systems of dams and aqueducts directed to the newly built fountains, independent libraries with collections of important manuscripts, and the foundation of the first Arabic-script printing press during the first half of the eighteenth century contributed to the material and intellectual prosperity in Istanbul. The growth of diplomacy brought about an increase in bureaucracy that crystallized in the position of chancellor and was reflected in higher level encounters with Europe, Russia, and Iran.[17]

Yet, this rise in the market as well as in bureaucratic encounters between the Ottomans and what was "foreign" brought new anxieties too. The Ottoman Empire rehabilitated its imperial image by emphasizing the Islamic qualities of the sultan, in an effort to compensate for losses from the long wars, the rise of consumerism, and non-Muslim (both internal and external) influences in society. The more Europeans, non-Muslims, and women appeared and were encountered in markets and in public life, the greater the anxieties of the authorities about the breakdown of the traditional social order. Sartorial regulations were not novel to the eighteenth-century Ottoman world; they had persisted throughout Ottoman history, based as they were on the Islamic sumptuary imperatives of distinguishing Muslims and non-Muslims in a hierarchical relationship in favor of the former. Yet, the authorities, both of Muslim and confessional groups, were more keen on such boundary markers for self-definition and self-policing from the eighteenth century onwards, as boundaries became more fragile as a result of the rapid changes taking place in society, especially in the urban centers of the empire.[18] For example, the Tulip Age,

15 Finkel, *Osman's Dream*, 363–364; Münir Aktepe, "İstanbul'un Nüfus Meselesine Dair Bazı Vesikalar," *Tarih Dergisi* 9, no. 13 (1958), 10.

16 Hamadeh, *The City's Pleasures*; Hamadeh, "Public Spaces and the Garden Culture of Istanbul in the Eighteenth Century," in *The Early Modern Ottomans: Remapping the Empire*, ed. Virginia Aksan and Daniel Goffman (Cambridge: Cambridge University Press, 2007).

17 Finkel, *Osman's Dream*, 364–369; Virginia H. Aksan, *An Ottoman Statesman in War and Peace: Ahmed Resmi Efendi, 1700–1783* (Leiden and New York: E.J. Brill, 1995); Virginia Aksan, "War and Peace," in *The Cambridge History of Turkey: The Later Ottoman Empire, 1603–1839*, ed. Suraiya Faroqhi (New York: Cambridge University Press, 2006).

18 Zilfi, *Women and Slavery*, 46–51.

FIGURE 1.2 *A female musician and a man* (*c. 1745*). The Album of Buharî, *Abdullah Buharî.* ISTANBUL UNIVERSITY LIBRARY, T 9364, FOLIO 6.

which is known mostly as a period of greater opportunity for women and the "intermingling of sexes" in public spaces (including streets, parks, and other places of entertainment), was, at the same time, a period which saw the issuance of a number of sumptuary regulations (like sartorial decrees on women and non-Muslims) to prevent transgressions of boundaries of religion, social class, and gender. Interestingly enough, the grand vizier Damad Ibrahim Pasha, who loosened the social pressure on women, issued an imperial decree in 1726 on women's public appearance in which he banned new extravagant "innovations" of ornaments and clothing of Muslim women and their "imitation of non-Muslims."[19] This decree, which was apparently not enforced, seems to have arisen "from wartime sensibilities or from the desire to appease moral or guild factions or both."[20] Yet, a similar imperial decree was issued in 1752, during the reign of Mahmud I, when there was no warlike situation or market

19 Ahmet Refik Altınay, *Hicri On İkinci Asırda İstanbul Hayatı* (Istanbul: Enderun Kitabevi, 1988), 86–88. For the interpretation and partial translation of the decree in English, see Zilfi, "Women and Society in the Tulip Era," 300–301; Finkel, *Osman's Dream*, 371.

20 Zilfi, "Women and Society in the Tulip Era," 300.

FIGURE 1.3 *A woman at the window* (*c. 1745*). The Album of Buharî, *Abdullah Buharî.* ISTANBUL UNIVERSITY LIBRARY, T 9364, FOLIO 12.

FIGURE 1.4 *Women's gathering in the meadow of Sa'dabad, Kağıthane.* Hûbânnâme ve Zenânnâme (*c. 1793*), *Fazıl Enderûnî Hüseyin.*
ISTANBUL UNIVERSITY LIBRARY, T 5502, FOLIO 78.

anxieties. This one aimed to restrict the freedom of women's travel to certain spectacles and picnic places, such as Kısıklı, Çamlıca, Bulgurlu, and Beykoz (all in Istanbul), in order to stop their "shameless acts" in those places.[21] (See Figure 1.4) Similarly, the reign of Osman III (r. 1754–57) witnessed numerous sumptuary regulations through which both men and women were punished by hanging, beating, and drowning according to the chronicles of the time.[22] Osman's followers, both Mustafa III (r. 1757–74) and Abdülhamid I (r. 1774–89), added more sumptuary regulations as the conservative Islamic reaction, mostly voiced by the Kadızadelis, rose against the increasing transgression of the boundaries between classes, confessional groups, and genders; these were transgressions that accompanied the increase in trade and diplomacy.[23]

21 "...envai fezahati şenayii müstetbi' harakatı gayri marzıyyeye ictisar eyledikleri..." in Altınay, *Hicri On İkinci Asırda İstanbul Hayatı*, 174–175.

22 Zilfi, "Women and Society in the Tulip Era," 301.

23 Finkel, *Osman's Dream*, 371; Marc David Baer, "Death in the Hippodrome: Sexual Politics and Legal Culture in the Reign of Mehmet IV," *Past and Present* 210 (2011): 80–83. The Kadızadelis were a seventeenth-century Islamic revivalist movement led by a preacher named Kadızade Mehmed Efendi. The movement served to further the Ottoman sunnitization project; they claimed to uphold the *shari'a* against innovation (*bidat*) and popular Islam, especially Sufism. For further information on the Kadızadeli movement, see Madeline C. Zilfi, "The Kadizadelis: Discordant Revivalism in Seventeenth-Century Istanbul," *Journal of Near Eastern Studies* 45, no. 4 (October 1986): 251–269; Derin Terzioğlu, "How to Conceptualize Ottoman Sunnitization: A Historiographical Discussion," *Turcica* 44 (2012–13): 301–338.

FIGURE 1.5 *Women in a public bath.* Hûbânnâme ve Zenânnâme (*c. 1793*), *Fazıl Enderûnî Hüseyin.*
ISTANBUL UNIVERSITY LIBRARY, T 5502, FOLIO 145A.

Zilfi argues that these prescriptive and sumptuary laws gained a rather ideological and systematic character in the form of policy making in the period after 1770, when European influence became domination. She points out that these laws were still spasmodic, i.e., they coincided with specific crises, and were dependent on the venality or *amour propre* of the enforcement officials.[24] Yet, one can see the seeds of such systematic policymaking in the arena of moral order in Ottoman society in the imperial government under Mahmud I.

Justice, Imperial Public Order, and Ottoman Politico-Judicial Authority

The shift in the boundaries separating the ruling class from the ruled (*reaya*, the taxpaying subjects), as well as the non-Muslims from the Muslims also affected the legal administration of the empire, as a result of larger socio-economic changes triggered by the restructuring of the finances, military, and the market. When the boundaries of the ruling class(es) expanded, legal regulations based on the clear-cut distinction between the *reaya* and the military and the ideological legitimizing mechanisms based on law had to change. While the sultan promulgated law books to assert its imperial legitimacy in the newly conquered territories in the sixteenth century through his *siyasa* discretion authorized by the *shari'a*, there are no such compilations for the following two centuries. Scholars of Ottoman historiography have long interpreted the lack of such compilations as the triumph of the *shari'a* over the *kanun*, albeit they offer different explanations. The current chapter argues that the political leader's juridical discretion, intrinsic to the *shari'a* and the *kanun* practices of the eighteenth century, was larger phenomenon than the promulgation of law books. Thus, I argue that as the *kanun* became a common property as a result of the constitutional arrangement between various socio-political groups, it sustained its legitimacy to regulate the moral order of Ottoman society through its administrative and penal regulations in the eighteenth century.

The Muslim Sovereign as Judicial Enforcer

In Islamic law, especially in the Hanafi school of law that the Ottomans officially adopted, the principle of *siyasa shar'iyya* provided grounds for the political prerogative of the sovereign, and the government on his behalf, to maintain public order. While books of *fiqh* (jurisprudence) discuss topics under two main categories, worship/rituals (such as prayer, zakat, pilgrimage, etc.) and

24 Zilfi, *Women and Slavery*, 59–60.

conduct/transactions (including private claims such as sales, inheritance, and marriage, as well as issues of public order, such as *hadd* offenses, discretionary punishments, and the conduct of judges); the range and order of the topics differ from one school to another.[25] According to Johansen, Hanafi jurists sought to guarantee a system of private legal relations (claims of men, *huquq al-ʿibad*) to the disadvantage of laws concerning public interest (claims of God, *huquq Allah*).[26] Thus, issues concerning public order, the most prevalent of which, namely, jurisdiction over taxes and punishment for certain crimes called fixed crimes (*hadd*, pl. *hudud*),[27] were delegated, for the most part, to the government as the trustee of the public interest. According to Hanafi jurists, "the public interest, therefore, has to be represented in terms of *huquq allah*, absolute and unreciprocated claims of the public as represented by the state and religion."[28] While by the eighth century the principle of *taʿzir* (discretionary punishment) already granted the executive authority to punish crimes that would otherwise be difficult to prosecute according to the strict rules of evidence imposed by Islamic jurisprudence,[29] *siyasa* conceded a larger power to the sovereign than *taʿzir* did. *Siyasa* (*siyasatan*, Tk., *siyaseten*) punishments are those executed by rulers that exceed the *fiqh* limits for *taʿzir* penalties and do not comply with strict *fiqh* rules.[30] This politico-administrative jurisdiction of the government as the judicial enforcer was called, in Islamic jurisprudence, *siyasa sharʿiyya*. Thus, through *siyasa* rulers could extend their discretionary

25 Kristen Stilt, *Islamic Law in Action: Authority, Discretion, and Everyday Experiences in Mamluk Egypt* (Oxford and New York: Oxford University Press, 2011), 58; Wael B. Hallaq, *Sharīʿa: Theory, Practice, Transformations* (Cambridge, UK and New York: Cambridge University Press, 2009), 551–555.

26 Baber Johansen, *Contingency in a Sacred Law: Legal and Ethical Norms in the Muslim Fiqh* (Leiden and Boston: Brill, 1999), 211.

27 *Hadd* crimes are considered "offenses against God" in Islamic law; these include theft, highway robbery, unlawful sexual intercourse [*zina*], false accusation of unlawful sexual intercourse [*kazf*], and drinking alcohol. See Chapter 4 for a more detailed analysis of the categorization of crimes in Islamic law.

28 Johansen, *Contingency in a Sacred Law*, 211.

29 Baber Johansen, "Secular and Religious Elements in Hanafite Law: Function and Limits of the Absolute Character of Government Authority," in Johansen, *Contingency in a Sacred Law* (Leiden and Boston: Brill, 1999), 216. Also see Rudolph Peters, *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-First Century* (Cambridge, UK and New York: Cambridge University Press, 2005), 65–68; M.Y. Izzi Dien, "Taʿzir" in *Encyclopaedia of Islam, Second Edition*, ed. P. Bearman, et al. (Brill Online, 2008).

30 Frank E. Vogel, *Islamic Law and Legal System: Studies of Saudi Arabia* (Leiden and Boston: Brill, 2000), 249–250.

powers beyond *taʿzir,* i.e., beyond the maximum limit allowed by jurists, to fight threats to public order.[31]

The jurists, on the one hand, tried to limit the judicial interference of political authorities to restricted domains, but, on the other, they often accepted the *siyasa* jurisdiction of the sovereign, who took measures in the interest of public order. As a result, even as early as the tenth century, they granted the government the right to even transgress the sphere of the "claims of God," that is, the sphere of fixed crimes (*hudud*), in order to protect public order. Vogel reminds us that "ulama even contemplate that ordinarily punishments *siyasatan* are inflicted without formal proof or trial before the *qadi*, making clear how much they consider these penalties to rest solely on the ruler's personal responsibility."[32] It was this voluntary submission that created, in the history of Islamic legal theory, a built-in tension between governors who overstepped their sphere of competence (*siyasa sharʿiyya*) to maintain public order and jurists who wanted to expand the sphere of private legal relations.[33] Johansen claims that "penal law and fiscal law are rather rough drafts if compared to the detailed definitions of the 'claims of men'" in Hanafi *fiqh* and adds that "administrative law is virtually non-existent in the law books."[34] In the final analysis, the government must safeguard the "claims of men," and "the absolute character of government action is only accepted as long as it secures the settlement of humdrum, non-absolute issues of daily life by the individual legal persons."[35]

Here it is noteworthy that jurists did not identify specific punishments and the means of penalizing the vast majority of offenses that did not fit into the rubric of *hadd* offenses. Whereas jurists produced elaborate rules of procedure and punishment for *hadd* offenses, discretionary punishments (*taʿzir*) were only discussed in terms of their maximum limits; in addition, these differed

31 Ibid., 250; Peters, *Crime and Punishment in Islamic Law*, 68.

32 Vogel, *Islamic Law and Legal System*, 250.

33 For one of the earliest concise and intelligent analyses of the tension between the government and lawyers in Hanafi legal theory, see Johansen, "Secular and Religious Elements in Hanafite Law," 210–218. Also see Peters for the fine difference between *siyasa* and *taʿzir* in the classical doctrine, Peters, *Crime and Punishment in Islamic Law*, 67–68. Kristen Stilt recently made a nuanced analysis of the "competition and cooperation" of two sources of authority, juristic doctrine and sultanic policy, i.e., *fiqh* and *siyasa*, by studying the office of *muhtasib* in the Mamluk sultanate, see Stilt, *Islamic Law in Action*. She builds her analysis on Vogel's conception of the tension between *ulema* and ruler as coming from a distinction between *fiqh* and *siyasa*, rather than one between *shariʿa* and *siyasa*. Vogel, *Islamic Law and Legal System*.

34 Johansen, *Contingency in a Sacred Law*, 216.

35 Ibid., 218.

according to the school of law, and most of the time they appeared in a relatively small section under *hadd* crimes.[36] Even though the one enforcing the punishment could also be the judge, in general, executive officers acted on behalf of the ruler/sovereign. In that sense, discretionary punishment had "all the earmarks of *siyasa*, that is, it is based in the utility, elusive of regulation by *fiqh* rules and doctrine, tied to social and temporal circumstance, and unavoidably associated with the power of the ruler."[37] Although *taʿzir* was the most commonly practiced form of punishment in Islamic practice,[38] as a residual category it did not occupy a large space in *fiqh* works. Yet, by not elaborating on it, jurists might in fact have left the topic almost to the absolute discretion of the ruler. This reflects the ambivalence of jurists toward *taʿzir* and *siyasa*: While on the one hand it was inevitable, both in theory and practice, to acknowledge the ruler's power to enforce public order, on the other hand, juridical law did not seek to, or dare to further designate this political jurisdiction.[39] By limiting their discussion of discretionary punishments to a subsection under *hadd* crimes in *fiqh* books, they may have wanted to limit this discretion to the jurisdiction of *hadd*. Frank Vogel even claims that the "common identification of *fiqh* and *shariʿa* in itself represents a signal ideological success for the ulama."[40] The contributions of the ruler to the legislation and implementation of Islamic law has been neglected, in large part, in the historiography of Islamic law shaped by the jurists.[41]

In this sense, the social and political tensions that we see in Ottoman history reflect the longer Islamic history of the relationship between the doctrines

36 Stilt, *Islamic Law in Action*, 29–30. Ottoman *fetva* collections of the eighteenth century reflect the same pattern of discussing *taʿzir* under *hadd* crimes. See Chapter 5.

37 Vogel, *Islamic Law and Legal System*, 248–249. Also see Peters, *Crime and Punishment in Islamic Law*, 65–68.

38 Peters, *Crime and Punishment in Islamic Law*, 65–66. Hallaq, *Sharīʿa*, 322–323. Stilt calls our attention to the fact that scholars of Islamic law have made voluminous studies of *hadd* crimes, as they occupied a central place in *fiqh* books; by contrast they did not pay enough attention to discretionary punishment, since they require investigation largely from historical sources rather than doctrinal ones. Stilt, *Islamic Law in Action*, 29 n.64.

39 Vogel even argues that the microcosmic power of the *ulema* swallowed up the macrocosm of the state and public law through their theory of public law in *fiqh*. He argues that they implicitly positioned themselves as arbiters of the legitimacy of the state. For a detailed discussion of this controversial argument, see Vogel, *Islamic Law and Legal System*, 190–198.

40 Ibid., 172.

41 Nimrod Hurvitz, "The Contribution of Early Islamic Rulers to Adjudication and Legislation: The Case of the Mazalim Tribunals," in *Law and Empire: Ideas, Practices, Actors*, ed. Jeroen Frans Jozef Duindam, et al. (Brill, 2013), 137.

of jurists and policies of governments. In Ottoman historiography, this tension was traditionally formulated as a binary constructed between religious and secular law,[42] or between the *shari'a* and the *kanun* in a "dual system," as if each operated in different fields.[43] By contrast, there has been an attempt to conceptualize the Ottoman legal system as the perfect application of the principles of Islamic law and to shrink the *siyasa* jurisdiction of political authorities in the Ottoman Empire to an almost negligible quantity, in favor of *shari'a* jurisdiction.[44] Yet, many scholars today challenge such antagonistic understandings and instead situate discussions of Ottoman imperial law within general discussions of the tensions between *fiqh* and *siyasa* in Islamic law; they conceptualize, albeit from different perspectives, the Ottoman *kanun* as part of the political struggles between different authorities of juridical and legislative powers in the Ottoman polity.[45] Here, I follow Stilt's challenge regarding

42 As in Heyd, *Studies in Old Ottoman Criminal Law*.

43 Imber claims that the *kanun* in the sixteenth century "regulated areas where the provisions of the sacred law were either missing or too much at odds with reality to be applicable." Colin Imber, *The Ottoman Empire, 1300–1650: The Structure of Power* (New York: Palgrave Macmillan, 2002), 244. Also see Imber, *Ebu's-su'ud: The Islamic Legal Tradition* (Stanford, CA: Stanford University Press, 1997). While İnalcık conceives the *kanun* as independent state law in conflict with the *shari'a* in Halil İnalcık, "Kanunname," *Encyclopaedia of Islam, Second Edition* (Brill Online, 2009). Barkan eulogizes *kanun* as customary law over the *shari'a* and and thinks that it complements the latter in administrative law. Ömer Lütfi Barkan, *XV ve XVI'ıncı Asırlarda Osmanlı İmparatorluğunda Zirai Ekonominin Hukuki ve Mali Esasları* (Istanbul: Bürhaneddin Matbaası, 1943); Barkan, "Kanunnameler," in *İslam Ansiklopedisi* (Ankara: Milli Eğitim Bakanlığı Yayınevi, 1952).

44 Although Ahmet Akgündüz makes a very nuanced analysis of the fact that the Ottoman *kanun* was indeed an implementation of the *siyasa* jurisdiction of political authority coming from Islamic legal principles, his ideological agenda is to demonstrate the "limited" nature of the politico-legal jurisdiction of the Ottoman sultans and *kanunname*s and prove that legislative and judiciary practices of *siyasa* were always closely scrutinized and limited by Islamic jurisprudence, and constituted only 15 percent of the entire jurisdictional practice. Ahmet Akgündüz, *Osmanlı Kanunnameleri ve Hukuki Tahlilleri*, vol. 1 (Istanbul: Fey Vakfı, 1990), 45–77. For an extensive analysis of the historiography of the *kanun-shari'a* debate in Ottoman studies with a critique of the "dual system" approach through Akgündüz's objection of the depiction of *kanun* as "secular law," see Boğaç A. Ergene, "Qanun and Sharia," in *The Ashgate Research Companion to Islamic Law*, ed. Rudolph Peters and P.J. Bearman (London and New York: Routledge, 2014).

45 For some of these studies, see Gerber, *State, Society and Law in Islam*; Tezcan, *The Second Ottoman Empire*; Ergene, "Qanun and Sharia;" Guy Burak, *The Second Formation of Islamic Law: The Hanafi School in the Early Modern Ottoman Empire* (New York: Cambridge University Press, 2015). Their various perspectives on the relationship of *fiqh* and *siyasa* in different epochs of Ottoman rule is discussed in the following pages.

the distinction between the "religious" and "political," and adopt her conceptualization of these social tensions as one between juristic doctrine and sultanic policy, in an effort to understand the various sources of authority and discretion in Mamluk Egypt.[46] Rather than conceptualizing the "religious" as fixed and the "political" as a changing system, one should look at the praxis in which religious doctrine interplays, negotiates, and comes to terms with the sovereign's discretion in various historical contexts. In that sense, as a historical example of such an interaction, the Ottoman *kanun* has both commonalities with and differences from the earlier and later empires in Islamic geographies. In other words, one should concentrate on the historical applications of Islamic law in order to identify how politics has shaped the relationship between the ruler and jurists as sources of legal authority. In Ottoman history, as in other historical and regional contexts, the terms of this relationship was not fixed; rather it took on multiple forms according to the socio-political configuration of power relations between different groups in different periods.

The "circle of justice" and Ottoman Political Thought

The close relationship between the idea of the wise and moral ruler and the well-being and honor of his subjects upon which the Ottoman idea of justice was constructed has its roots in a universal perennial repertoire.[47] (See Figure 1.6) Inspired by Greek political wisdom literature and themes from the writings of apparently Sasanian origin, Arabic political writing in the Umayyad and Abbasid periods was established on some aggregative common topics of power among which are the axial position of power (sultan) in the organization of social order and "the direct impact of his virtues and vices upon the moral tenor of his subjects."[48] The "mirror for princes" or "advice for kings" genres written by courtiers such as Nizam al-Mulk (1018–92) and by prominent *ulema*

46 Stilt, *Islamic Law in Action*, 24–34. In this, she follows Vogel's approach as an endeavor to understand the Islamic legal system as being composed of the competition and cooperation between *fiqh* (law, legal conceptions, and legal institutions viewed from the *ulema* perspective) and *siyasa* (law, legal conceptions, and legal institutions viewed from the ruler's perspective) in terms of legitimacy and authority. See Vogel, *Islamic Law and Legal System*, 169–173, 190–207.

47 The discussion on the "circle of justice" here is constructed from my previous study. Başak Tuğ, "Gendered Subjects in Ottoman Constitutional Agreements, ca. 1740–1860," *European Journal of Turkish Studies* [*Online*] 18 (2014), http://ejts.revues.org/4860.

48 Aziz al-Azmeh, *Muslim Kingship: Power and the Sacred in Muslim, Christian and Pagan Polities* (London and New York: I.B. Tauris, 2001), 83–95. Also see Linda T. Darling, *A History of Social Justice and Political Power in the Middle East: The Circle of Justice from Mesopotamia to Globalization* (New York: Routledge, 2013), 15–84.

luminaries like al-Ghazali (1058–1111) and al-Mawardi (972–1058) used a political repertoire of hierarchy that emphasized the primacy of king over society and denoted self-mastery as a prerequisite for the proper exercise of power and ethical preconditions of just rulership that were derived from Aristotelian ethics and material of Greek origin.[49]

Yet, what the works of advice for kings written by the Arabic *ulema* did was rename and recast "the perennial political wisdom attributed to Persians, Greeks or others" as "prophetic or Koranic" and insert it "in a distinctive genealogy that is specifically Muslim."[50] This is how, according to Aziz al-Azmeh, the Muslim character of public institutions was brought about. The development of the genre of *shari'a* politics (*siyasa shar'iyya*) which set the discursive rules of legal governance was also based on the amalgamation of the paradigm of political writings with absolutist claims and of Muslim jurisprudence with prescriptive exemplary models.[51] Hence, the idea that the ruler represents an exemplary moral model for his subjects and therefore determines the moral order of the society he rules is an ancient one upon which early Ottoman political thought was established.

First, the Ottomans appropriated and transformed many of these ideas into a local model that changed according to shifting political and social needs throughout the long history of the empire. Early Ottoman political writings, such as Ahmedî's (ca. 1334/35–1412) *Iskendernâme* and Tursun Beğ's (after 1426–88) *Târîh-i Ebü'l-Feth* (History of the conqueror), adopt the ethical discourse on kingly virtues emphasized in earlier literature, for example, by explaining the close connection between the ruler's moral virtues, like his honor or honesty (*'iffet*) and justice (*'adâlet*).[52] In *Kanûn-i Şehinşâhî* (Imperial laws), Bitlisî (ca. 1450–1520) defines four cardinal virtues (honesty/chastity, courage, wisdom, and justice) among which justice represents the combination of the other three. Furthermore, affection and fairness toward his subjects ("the same way he expects his subjects to fulfill their own obligations") are intrinsic to his definition of justice.[53] Note that the relationship between the king and his subjects is defined in mutual terms.

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49 Al-Azmeh, *Muslim Kingship*, 94–98. Also see Darling, *A History of Social Justice*, 85–102.

50 Al-Azmeh, *Muslim Kingship*, 99.

51 Ibid., 100.

52 Marinos Sariyannis, "The Princely Virtues as Presented in Ottoman Political and Moral Literature," *Turcica*, no. 43 (2011), 122–126. Also see Darling, *A History of Social Justice*, 128–133.

53 Here I borrow M. Sariyannis' translation of Bitlisî and his summary of the four cardinal virtues. Sariyannis, "The Princely Virtues," 124–126.

FIGURE 1.6 *A scene representing the sultan's justice. Mehmed I, Çelebi, giving the order to his chamberlain for the punishment of the Ottoman cavalryman who looted an apiary and stole honey from Christian peasants in Ruschuk* (*by the Danube*). Hünernâme*, Seyyid Lokman.* TOPKAPI PALACE MUSEUM LIBRARY, H 1523, FOLIO 121A.

From the late sixteenth century onwards, and especially in the seventeenth and eighteenth centuries, these exemplary models became a more abstract model of governance with the idea of the "circle of justice." The idea was conceptualized in Ottoman political writings such as Kınalızade Ali Çelebi's (d. 1572) *Ahlak-i ʿAla'i* (1565), Hasan Kâfî Akhisarî's *Usulü'l-Hikem fi Nizamı'l-Alem* (1596), Koçi Bey's *Risale* (1631), and Kâtib Çelebi's *Düsturü'l-ʿamel* (1652–53).[54] Kınalızade's version, which repeats an aphorism attributed to Aristotle's letter of advice to Alexander the Great, states that

> Justice leads to the rightness of the world; the world is a garden, its walls are the state; the state is ordered by the shariʿa; the shariʿa is not guarded except by the king; the king cannot rule except through an army; the army is summoned only by wealth; wealth is accumulated by the subjects; the subjects are made servants of the ruler by justice.[55]

In more concrete terms, rather than highlighting the specific virtues of the ruler, the "circle of justice" most often defined a model of good administration and governance, albeit mostly in relation to the ruler, but also through more abstract notions of state, justice, and the prosperity of the subjects. This does not mean that the idea of the "circle of justice" was an Ottoman contribution to Islamic politics. On the contrary, the idea of the circle was an ancient

54 For detailed analyses of these works, see, respectively, Baki Tezcan, "The Definition of Sultanic Legitimacy in the Sixteenth Century Ottoman Empire: The Akhlaq-i Ala'i of Kınalızade Ali Çelebi (1510–1572)" (MA thesis, Princeton University, 1996); Gottfried Hagen, "Legitimacy and World Order," in *Legitimizing the Order: The Ottoman Rhetoric of State Power*, ed. Hakan Karateke (Leiden and Boston: Brill, 2005). Mehmet İpşirli, "Hasan Kafi el-Akhisari ve Devlet Düzenine Ait Eseri *Usulü'l-Hikem fi Nizamı'l-Alem*," *Istanbul Üniversitesi Edebiyat Fakültesi Tarih Dergisi*, nos. 10–11 (1979–80); Sariyannis, "The Princely Virtues;" Heather Ferguson, "Genres of Power: Constructing a Discourse of Decline in Ottoman Nasihatname," *Osmanlı Araştırmaları* (*Journal of Ottoman Studies*), no. 35 (2010). For analyses of the legitimizing discourses of justice through the circular view of justice in Ottoman political thinking, see Boğaç A. Ergene, "On Ottoman Justice: Interpretations in Conflict (1600–1800)," *Islamic Law and Society* 8, no. 1 (2001); Hagen, "Legitimacy and World Order." For a more general discussion of the concept of "circle of justice" in early Islamic empires and throughout the Ottoman history, including the reformation period of the nineteenth century, see Linda T. Darling, "Islamic Empires, the Ottoman Empire and the Circle of Justice," in *Constitutional Politics in the Middle East: With Special Reference to Turkey, Iraq, Iran, and Afghanistan*, ed. Said Amir Arjomand (Oxford and Portland: Hart Pub., 2008); Darling, "Circle of Justice," in *Encyclopaedia of Islam, Three*, ed. Kate Fleet, et al. (Brill Online, 2013); Darling, *A History of Social Justice*.

55 As translated and quoted in Hagen, "Legitimacy and World Order," 65.

Mediterranean and Near Eastern philosophical tradition that influenced political thinking. The Near Eastern conception of the state puts the ruler, by divine appointment, at the center of the polity; he has a reciprocal relationship with his subjects through production, taxation, and justice, but he also transcends all the other classes in the society.[56] There were of course variations in the Ottoman model, too: While Kınalızade situated the sultan apart from different classes in society, Hasan Kâfî counted him as a member of the military class.[57] There was almost no disagreement among Ottoman political thinkers on the issue of Ottoman society being organized in social classes (i.e., the men of the sword, the men of the pen, the men of agriculture, and the men of commerce and trade), and, the sultan being responsible for creating a balance among them by keeping "everybody in due place."[58]

It would seem that what made the "circle of justice" more appealing to the Ottomans in later centuries was its intrinsic emphasis on institutionalized governmental structures, more than its focus on the personal virtues of the sultan. To establish a reciprocal system of governance and organize the social relationships between different classes and groups in an anticipated balance, the circle implies that the state must provide specialized institutions; these institutions include, for example, finance ministry to manage agricultural infrastructure, laws and revenue surveys, and courts of petitions. Thus, after the sixteenth century, the idea of the circle served the interests of Ottomans who were engaged in a process of state formation and bureaucratization.

Ottoman Siyasa, Public Order, and the Ruling Elite in the Sixteenth Century

The Ottomans used this aggregative repertoire in their praxis of politico-administrative jurisdiction. The necessity of maintaining public order through administrative and penal regulations gave rise to Ottoman legal institutions, as had also happened in other Muslim societies before the Ottomans. The Ottoman Empire was, historically, peculiar in its exercise of this jurisdiction in a more bureaucratized and hierarchical application of state control. The Ottomans adopted Hanafi law as the official school of law to define fundamental procedural matters, though they did not prohibit their subjects from "forum shopping;" subjects could appeal to different courts and jurisconsults,

56 Darling, "Circle of Justice."

57 Hagen, "Legitimacy and World Order," 63–64.

58 Ibid., Also see Ergene, "On Ottoman Justice," 56–57.

or muftis, of different schools.[59] In order to establish the Hanafi school as official, they founded a system of Islamic learning by establishing a system of colleges to train Islamic scholars, muftis, and judges of Islamic courts.[60] They thus focused on incorporating the *ulema* into the state apparatus and created a bureaucratized hierarchy of authority. On the one hand, the Ottomans established a branch of official jurists who were paid and appointed by the government, whereas on the other, they also kept the non-official character of jurisprudence and jurists.[61] The principal legal institutions of the empire were the *shari'a* courts, which were divided into judiciary districts headed by a judge (*kadı*) who was educated in designated colleges and appointed by Istanbul for a short interval. The judges were assisted by deputy judges (*naib*s) in the subdistricts; the latter were, for the most part, educated and appointed locally.[62]

Parallel to the *shari'a* courts, which were the principle legal institutions throughout the empire, the Imperial Council (Divan-ı Hümayun), as a legislative and executive court, administered public order through imperial statutes and decrees. The Imperial Council was in fact established upon the medieval Islamic notion of *mazalim* jurisdiction. *Mazalim*, literally "injustice and wrongful deeds," was directly related to the idea that a Muslim sovereign, as the trustee of public order, was responsible for the removal of injustice. *Mazalim* courts, which allowed subjects to petition the caliph directly in the case of injustices perpetrated by official and semi-official powers, had existed in medieval Islamic Arab and Iranian states even before the emergence of the

59 The recent study of Guy Burak connects the Ottoman effort to create an official school of law with the general context of the rise of the post-Mongol notion of "dynastic law" through which "the dynasties and sultans were able to regulate the structure of the school and its doctrine." Burak, *The Second Formation of Islamic Law*, 17–18.

60 Imber, *The Ottoman Empire, 1300–1650*, 227; R.C. Repp, *The Müfti of Istanbul: A Study in the Development of the Ottoman Learned Hierarchy* (London and Atlantic Highlands, NJ: Ithaca Press, 1986); Burak, *The Second Formation of Islamic Law*, 38–64.

61 Repp, *The Müfti of Istanbul*. Engin Deniz Akarlı, "The Ruler and Law Making in the Ottoman Empire," in *Law and Empire: Ideas, Practices, Actors*, ed. Jeroen Frans Jozef Duindam, et al. (Leiden: Brill, 2013), 95–96.

62 For the Ottoman court system, see Akarlı, "Islamic Law in the Ottoman Empire," in *The Oxford International Encyclopedia of Legal History*, ed. Stanley Nider Katz (Oxford and New York: Oxford University Press, 2009); İsmail Hakkı Uzunçarşılı, *Osmanlı Devletinin İlmiye Teşkilatı* (Ankara: Türk Tarih Kurumu, 1965); Halil İnalcık, "Mahkeme," in *İslam Ansiklopedisi* (IA) (Istanbul: Milli Eğitim Basımevi, 1970), 146–151; M. Akif Aydın, *Osmanlı Devleti'nde Hukuk ve Adalet* (Istanbul: Klasik, 2014); Akarlı, "The Ruler and Law Making in the Ottoman Empire."

Ottoman Empire.[63] Al-Mawardi, an eleventh-century Shafi'i jurist who discussed extensively the relationship between *mazalim* and *siyasa* in his *Kitab al-Ahkam al-sultaniyya*, held the military governor (*amir*) responsible for the maintenance of public order and security, whereas he gave the judge (*kadı*) the right to adjudicate to protect the rights of individuals in litigation between private parties.[64] The Near Eastern concept of the ruler is noteworthy; the ruler as the one who protects subjects from the power elite resonates in this understanding of *mazalim* jurisdiction.

The Imperial Council was in fact the embodiment of the idea of the "circle of justice;" in it the moral virtues associated with the ruler were institutionalized. The judicial and administrative roles of the sultan in the Divan started to diminish by the time of Mehmed II (r. 1451–81) and were gradually transferred to the grand vizier and his government through the physical as well as functional move of the Divan-ı Hümayun to the "Council of the Pasha's Gate" (Paşakapısı Divanı) from the sixteenth century to the eighteenth century. However, it still symbolized the abstract notion of "good governance" and "justice" that was perceived as the responsibility of the sultan toward his subjects in the circular, reciprocal relationship between the state and the subjects.[65] That is, injustice in society should be prevented by this governmental institution that embodied the sultan who was responsible for maintaining social balance.

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63 For a detailed description of *mazalim* in the early Islamic states and under the Bahri Mamluks, see Nielsen, *Secular Justice in an Islamic State*; Nielsen, "Mazalim," in *Encyclopaedia of Islam, Second Edition*, ed. P. Bearman, et al. (Brill Online, 2008). For other early Islamic examples, see Hurvitz, "The Contribution of Early Islamic Rulers to Adjudication and Legislation;" Mathieu Tillier, "Qāḍīs and the Political Use of the Maẓālim Jurisdiction under the 'Abbāsids," in *Public Violence in Islamic Societies: Power, Discipline, and the Construction of the Public Sphere, 7th–19th Centuries CE*, ed. Christian Lange and Maribel Fierro (Edinburgh: Edinburgh University Press, 2009). For historical analyses and comments by Ibn Khaldun and Ibn Taymiyya on the division of labor between the *kadı* and the tribunal courts (*mazalim* and *shurta*) as part of Islamic legal practice, see Vogel, *Islamic Law and Legal System*, 227–229.

64 Ali b. Muhammad al-Mawardi, *al-Ahkam as-Sultaniyyah: The Laws of Islamic Governance*, trans. Asadullah Yate (London: Ta-Ha Publishers, 1996). For biographical information on al-Mawardi, see C. Brockelmann, "Al-Māwardī Abu'l-Hasan Alī b. Muhammad b. Habīb," in *Encyclopaedia of Islam, Second Edition*, ed. P. Bearman, et al. (Brill Online, 2009). For a discussion of the matters in which *mazalim* courts had greater powers than the *kadı*, see Vogel, *Islamic Law and Legal System*, 298–301.

65 Ferguson also pinpoints a dilemma: the sultan retained a "highly visible presence in Ottoman reform treatises while being in retreat from the daily administration of imperial affairs as well as from the writers' conception of justice." Ferguson, "Genres of Power," 97.

The Divan functioned as a parallel but superior judiciary organ that heard petitions, judged some important cases of petitioners in its own court (*divan*), and in other cases sent imperial orders to provincial governors and judges in order to resolve issues there. The judicial functions of the Divan-ı Hümayun were carried out by the military judges of Rumelia and Anatolia. They were responsible for the supervision of the judges in their respective provinces and for hearing cases in the Imperial Council. While adhering to legal procedures similar to those applied in the *shari'a* courts, the ruler's ratification through the grand vizier was necessary for the implementation of their decisions.[66]

With regard to the legislative functions of the Divan, the Ottomans made an innovative contribution to Islamic legal practice; namely, the sultans promulgated law books. From time to time, but mostly in the sixteenth century, the imperial decrees written in response to petitions complaining about some judicial and administrative injustices were formulated in the manner of a "rescript of justice" (*adaletname*) that explained certain regulations and orders on governance, administrative, and judiciary principles, and were sent to provincial governors and judges all over the empire as "warnings."[67] These "rescripts of justice" were actually proto-statutes (*kanun*) in the sense that their implementation was required, they were registered in the court records, and even promulgated to the public.[68]

The culmination of Ottoman power over the politico-administrative jurisdiction was the codification of all these regulations and orders concerning public order into law books which started to be codified at the end of the fifteenth century (by Mehmed II); this process continued throughout the sixteenth century. The law book of Süleyman I, compiled between 1534 and 1545, is considered the most comprehensive version as it includes the most detailed penal codes; it is therefore referred to in Ottoman studies as *the* Ottoman

66 Akarlı, "The Ruler and Law Making in the Ottoman Empire," 94.

67 Halil İnalcık, "Adaletnameler," *Belgeler* 2, no. 3–4 (1965); İnalcık, "Adaletname," in *TDV İslam Ansiklopedisi* (TDV Yayınları, 1988).

68 People were allowed to have copies of the *adaletname* that was registered in the court records. İnalcık, "Adaletname," 346. There are examples in the court records of people using copies of the *adaletname* in order to prove their case. Suraiya Faroqhi, "Political Activity among Ottoman Taxpayers and the Problem of Sultanic Legitimation (1570–1650)," *Journal of the Economic and Social History of the Orient* 35, no. 1 (1992): 7–13. İnalcık states that Ottoman *adaletname*s descended from an older Islamic tradition of issuing imperial declarations against provincial rulers and posting them as inscriptions in public places such as mosques and city walls. İnalcık, "Adaletnameler," 51.

criminal code.[69] In fact, these general law books, which were intended to provide consistency and uniformity in legal and administrative norms, were compendiums based on provincial codes (*liva kanunnameleri*) that were issued and periodically revised throughout the sixteenth and seventeenth centuries in order to regulate taxation, administration, and land tenure regimes in each significant province.[70]

Scholars of Ottoman history have long debated about the reasons the sultans promulgated law books. According to scholars who see *kanun* practices as outside Islamic law, the *kanun* was promulgated to complement the *shari'a*.[71] For Imber, the *kanun* "regulated areas where the provisions of the sacred law were either missing or too much at odds with reality to be applicable."[72] These areas included criminal law, land tenure, and taxation, all of which jurists defined as public law under the jurisdiction of the ruler, i.e., *siyasa shar'iyya*. At the fiscal level, public order was maintained by the *kanun* on the basis of the separation between taxpaying subjects as producers (*reaya*) and the non-taxpaying ruling class; this was done by incorporating customary practices (*örf*) into law.[73] Even though this observation is sound, seeing custom and the *shari'a* as mutually

69 Heyd, *Studies in Old Ottoman Criminal Law*, 26–30. However, İnalcık argues that the provisions used in Süleyman's law book must have been issued at an earlier time, i.e., either during the reign of Mehmed II or that of Bayezid II. Halil İnalcık, "Suleiman the Lawgiver and Ottoman Law," in *The Ottoman Empire: Conquest, Organization, and Economy* (London: Variorum Reprints, 1978), 126. Yet recent research reveals the fact that Ottoman law books were amalgamations and abstractions of previous provisions, decrees, and customary laws. Semerdjian, *"Off the Straight Path,"* 36–37; Leslie Peirce, "Domesticating Sexuality: Harem Culture in Ottoman Imperial Law," in *Harem Histories: Envisioning Places and Living Spaces*, ed. Marilyn Booth (Durham, NC: Duke University Press, 2010).

70 Akarlı, "Islamic Law in the Ottoman Empire;" Yunus Koç, "Early Ottoman Customary Law: The Genesis and Development of Ottoman Codification," in *Shattering Tradition: Custom, Law and the Individual in the Muslim Mediterranean*, ed. Walter Dostal and Wolfgang Kraus (London and New York: I.B. Tauris, 2005), 85–92. For a detailed list and analysis of provincial law books, see Heath Lowry, "The Ottoman Liva Kanunnames Contained in the Defter-i Hakani," *Journal of Ottoman Studies* II (1981); Barkan, *XV ve XVI'ıncı Asırlarda Osmanlı İmparatorluğunda.*

71 For an extensive analysis of this approach and its representatives, see Ergene, "Qanun and Sharia," 111–114. In this literature, there is no distinction between the *shari'a* (divine law) and *fiqh* (the science of jurisprudence or human knowledge of divine law). Recent scholars advocate for the opposite, in order to better understand the interaction of *fiqh* with *siyasa* and *kanun* in the realm of the *shari'a*. For these distinctions, see Vogel, *Islamic Law and Legal System*, 171–172. Johansen, *Contingency in a Sacred Law*.

72 Imber, *The Ottoman Empire, 1300–1650*, 244. Also see Imber, *Ebu's-su'ud.*

73 Imber, *The Ottoman Empire, 1300–1650*.

exclusive is the reason some scholars have perceived the *kanun* as "secular" or outside Islamic law. In fact, one of the sources of Islamic law has always been custom, and from the early years of Islam jurists have incorporated custom into *fiqh*. Yet, the Ottoman *kanunname*s were not merely "officially sanctioned compilations of feudal administrative, financial, and sometimes penal customs that differed from region to region."[74] New studies on Ottoman *kanun* practices of the sixteenth century suggest that law books and the jurisprudential interpretations from the *şeyhülislam* on the land regime revealed a high level of accommodation of local practices, imperial customs, and Hanafi legal principles of the *miri* land regime.[75]

Thus, the legal and fiscal relationship between the ruling elite and the subjects/producers was one of the main areas covered by the regulations that the Ottoman politico-administrative jurisdiction set up through the imperial statutes. According to Abou-El-Haj, the early-modern Ottoman state was a "class-state," i.e., it was dependent on the class interests of the ruling elites, who subtracted surplus by exploiting the peasants.[76] In the sixteenth century the Ottoman central power perceived the provincial ruling elite as a legitimate extension of its rule, mainly based on common material and ideological interests. Whether the Ottoman center was successful in its attempt to tie the provincial

74 Tezcan, *The Second Ottoman Empire*, 23. Tezcan sees *kanunname*s as an integral outcome of cadastral surveys of Ottoman lands. As a result, he conceptualizes the *kanun* as a feudal law of an absolute power (ruler); this is in stark contrast with the jurists' law (*fiqh*), which is conceived as more flexible and thus suitable for the monetized market economy of the Ottoman polity after the sixteenth century.

75 Buzov's discussion of the role of legal discourse in the change of Ottoman imperial culture through Süleyman's law book and Ebussuud's *fetva*s clearly reveals that the law was continually being systematized and revised by practice (*örf*). Buzov also shows that this common enterprise established law as a common property and ensured the sovereignty of law over the persona of the sultan and the jurists in the following centuries. Snjezana Buzov, "The Lawgiver and His Lawmakers: The Role of Legal Discourse in the Change of Ottoman Imperial Culture" (PhD diss., University of Chicago, 2005), 86–131. Reem Meshal's work on the application and resistance to the Ottoman *kanun* in sixteenth-century Cairo suggests that even the construction of orthodoxy through the *kanun* with its universalizing claims was more of a transformative and "perpetually discursive" project than a rigid, authoritarian, and static ideal. Reem Meshal, "Antagonistic Sharīʿas and the Construction of Orthodoxy in Sixteenth-Century Ottoman Cairo," *Journal of Islamic Studies* 21, no. 2 (2010), 212.

76 Rifaʿat Ali Abou-El-Haj, "Power and Social Order: The Uses of the Kanun," in *The Ottoman City and Its Parts: Urban Structure and Social Order*, ed. D. Preziosi and R.A. Abou-El-Haj (New Roschelle, NY: A.D. Caratzas, 1991), 78–79.

elite to the imperial apparatus is still a complicated issue to be explored,[77] the display of "the juridical rights to impose, regulate and collect"[78] through these codified statutes became a symbolic as well as a practical marker of sovereignty, one that was particularly critical during the foundation of the new empire in the fifteenth and sixteenth centuries.[79] Hence, the central government promulgated uniform law books throughout the empire, and thus aimed to establish a universal "orthodoxy" through the *kanun* during the sixteenth century.[80]

Regulations on criminal law did not contradict the logic of the early-modern Ottoman state. As discussed, the penal, fiscal, and administrative laws were defined at the discretion of the political authority under Islamic jurisprudence. Thus, the Ottomans defined and punished most of the *hudud* and other offenses with discretionary punishments (*taʿzir*) through the *kanun* statutes. On the one hand, this flexibility allowed the Ottoman political power to delegate its "discretion" to the ruling elite to execute penalties and thus maintain public order according to the economic and social divisions established in society. This system enabled the Ottomans to continue to maintain and administer justice and public order basically under the jurisdiction of the police and *muhtasib* as in other Islamic states—not under the jurisdiction of the *kadı*s.[81] On the other hand, the division of labor established between the adjudication and execution of law enabled the Ottoman central power to bind the executive authority of the ruling elite, which might otherwise have been unrestrained, to the local judge's (*kadı*) adjudicative power. The encoding and promulgation of law books also enabled the central power to set the rules for its relationship with the ruling elite.[82]

In the sixteenth century, the *kanun* continued to designate executive power to the ruling elite and thus institutionalized their "discretion" in criminal jurisdiction while putting certain boundaries in place so as not to disturb the

77 Meshal's study demonstrates that local jurists in Cairo contested the codified imperial *kanun* not for being heterodox but on the contrary, for its claims to construct an Islamic orthodoxy by universalizing and homogenizing the *shariʿa*. In that sense, he challenges the mainstream conceptualization of the Ottoman legal culture as a tension between "*kanun* heterodoxy" and "*shariʿa* orthodoxy." Rather, he uses the term "antagonistic *shariʿa*s" to refer to diverse understandings of the *shariʿa* by Cairene jurists and the Ottomans. Meshal, "Antagonistic Sharīʿas."

78 Abou-El-Haj, "Power and Social Order," 79.

79 Peirce, *Morality Tales*, 116.

80 Meshal, "Antagonistic Sharīʿas."

81 For the tremendous discretion that the *muhtasib* had in the area of punishment in the Mamluk sultanate, see Stilt, *Islamic Law in Action*.

82 Heyd, *Studies in Old Ottoman Criminal Law*, 1–2.

balance of socio-economic divisions between the ruler and the ruled. In this sense, Heyd's observation that "the chief object of the Ottoman penal codes was not the protection of society against criminals but the protection of the common people against oppressive officials and fief-holders" is, to a certain extent, true.[83] This idea can also be observed in the preambles to some of the law books, where it is explicitly stated that people's complaints against the ruling elite were the reason behind the issuing of the *kanunname*.[84] As Hagen and Mumcu have pointed out, *zulm* (oppression) and *ta'addi* (transgression) on the part of power holders are not directly defined by Islamic jurisprudence under penal law.[85] In this sense, the transgressions and abuses of the ruling elite were regulated and brought under control by the *kanun*. Yet, in the final analysis, cooperation between the Ottoman central power and the provincial elite on the basis of a common class interest was much more evident in sixteenth-century imperial law than a clash between these powers on the matter of dispensing justice to Ottoman subjects was. However, with the confusion and blurring of the partnership between the central power and the provincial ruling elite on economic and political interests, the eighteenth century saw a different configuration of the *kanun* in relation to new social tensions.

Oligarchic Rule and Local Notables in the Eighteenth Century

As a result of new economic and administrative policies toward the end of the sixteenth century, the identification of the provincial ruling elite with the Ottoman central power on issues of economic and administrative interests started to change. Starting in the late sixteenth century, and through the eighteenth century, the commercialization of agriculture and the privatization of the fiscal economy became more crystallized, creating a new balance between the center and the provinces. Whereas the imperial center still remained the nexus of economic and administrative policies with its redistributive power and its relationship with a more diversified and localized ruling elite based on commercialized fiscal rules, it cannot be defined linearly, in contrast to the

83 Ibid., 176.

84 The *kanunname* for the Christians of the island of Cephalonia in the late fifteenth century was issued at the request of its inhabitants; they sent a representative to Istanbul to complain about oppressive tax-collectors and other officials and requested a *kanunname*. See, ibid., 14.

85 Ahmet Mumcu, *Osmanlı Hukukunda Zulüm Kavramı* (*Deneme*) (Ankara: Sevinç Matbaası, 1972), 7; Hagen, "Legitimacy and World Order," 72.

formative years of the empire. Furthermore, power in the imperial center also became more fragmented as a result of the constantly increasing bureaucratization of the state apparatus and the empowerment of the central elite to deal with the privatized economy in this period. All of this diversification and fragmentation, as well as the fluid relationship between the imperial center and the provincial ruling elite, created its own form of administrative and penal organization. The *kanun* of the eighteenth century had to regulate these constantly changing multi-dimensional power relations and could not be fixed in the form of codified regulations.

Redistribution of Economic and Administrative Power through Finances

The whole process of the commercialization of agriculture and the gradual privatization of property in the Ottoman Empire in the early-modern era started with the financial and economic reorganization that was undertaken to meet the monetary needs of the Ottoman political power. A number of events forced the Ottoman state to reorganize its finances on a cash basis; these included severe inflation because of an increase in the flow of silver to global markets, the need to adjust to new warfare techniques with the development of gunpowder, and the ongoing wars with the Habsburgs and the Safavids.[86] Rather than distributing taxable units of land (*timar*) to the ruling military elite to create a means of revenue, the Ottoman state sold the right to collect the land tax on state-owned (*miri*) lands to the highest bidder. Tax-farming (*iltizam*) contracts between new tax farmers and the state were made for a period of one or two years at a time.[87] This new fiscal economic structure enabled the Ottomans to pay its part-time troops. On the one hand the expanding commercial system enriched the provincial elites, who were composed of merchants, the local *ulema,* religious dignitaries,[88] and provincial officers, and it reinforced their autonomy in revenue collection and other administrative tasks. On the other hand, in the seventeenth century, the central state increased its liquidity by raising taxes.[89]

However, the Ottoman state was forced to find other initiatives to encourage tax-farming because of its financial losses from expenditures on the war against the Habsburgs (1683–89), the unwillingness of factions in the state elite

86 Salzmann, "An *Ancien Régime* Revisited," 398.

87 Abou-El-Haj, "Power and Social Order," 80.

88 For the *ulema* "dynasties" that acquired tremendous power through the *malikâne* system, see Zilfi, *The Politics of Piety*.

89 Salzmann, "An *Ancien Régime* Revisited," 399.

and short-term tax farmers' to sign contracts because of widespread insecurity, and the flight of rural peasants who feared social upheaval and "bandit" uprisings. Finally, in an edict of 1695, the Ottoman state authorized tax farmers to collect taxes on the basis of a lifelong established rate (*malikâne*). In time, lifelong tax farming became hereditary, since the right could be inherited as long as a male heir made an annual payment.[90]

The establishment of new lifelong tax-farming contracts was more closely linked to the notion of private property than short-term tax-farming was. Quasi-privatization of landed property and the commercialization of the Ottoman fiscal economy through competition over tax contracts created new alliances and divisions between different elite groups and changed the relationship of each with the Ottoman central power. The new elite, with their *malikâne*s, was composed of the grandee central elite, high-ranking *ulema*, rural and urban notables, and provincial janissaries. The competition and divisions between these groups and the blurring of the boundaries between social groups as a result of the selling of offices were social aspects of this new economic system.[91]

The second aspect was administrative; the provincial administration, i.e., local government, was mostly run by the local gentry (sometimes as agents of the central elite) who became much more autonomous and less willing to act as representatives of the central government, as compared to sixteenth-century military officials whose ties to the central government and the products of the subjects had been much more direct under the earlier *timar* system. Despite the fact that all holders of *malikâne*s, whether from the central elite or the provincial gentry, were dependent on Ottoman central power as the guarantor of their contracts and the nexus for redistributing offices,[92] the

90 Ibid., 401–402.

91 Baki Tezcan identifies these tax farmers as active agents who transformed the Ottoman patrimonial polity into the Second Empire (1580–1826), in which the ruling elite of the empire created an imperial common market with a single currency and a certain degree of autonomy from political authorities. According to Tezcan, the construction of a "political nation" as a result of the constitutional activities of the entrepreneurs in the market and the jurists who supported "private law" was possible by limiting the royal prerogative. Tezcan, *The Second Ottoman Empire*, 19–45. Even though I also acknowledge the transformative constitutional role of the ruling elite and the tax-farming system, I approach sultanic authority and the viziers—what Tezcan calls the absolutists—as well as the *kanun* practices as part of this political nation and constitutional arrangement. Tax-farming was not based on a free market economy; on the contrary, it was established on a war economy and state-sponsored system of finances and redistribution. Thus, the central government was an integral part of the market and therefore the constitutional negotiations.

92 For a brilliant analysis of the web of fiscal, legal, administrative, and cultural practices that constituted the interdependency between the central state and various social groups

economic, social, and, ultimately, administrative autonomy of certain local groups cannot be underestimated. Local notables who already had the social and economic means to be autonomous regionally gained the upper hand when they obtained various government offices and increased their influence through this "official" power. Entrepreneurial ties between the central state and local notables did not always make the local notables willing to co-operate administratively with the center. On the contrary, more administrative power brought more autonomy to the local notables.[93]

From the "absolute" Majesty of the Sultan to the "oligarchic" Government of the Grand Vizier

The expansion of provincial government with the increasing power of the local elite does not necessarily mean that the central administration lost its power. As Salzmann pointed out with reference to Tocqueville, state consolidation was not "a zero-sum game in which the center perpetually gained the upper hand as peripheries surrendered powers"[94] or vice versa. Provincial government grew alongside and consecutively with the expanding central government which needed the bureaucratic abilities to carry out its redistributive policies in the seventeenth and eighteenth centuries. Yet, the main actors in the central government were also changing in correspondence to the new organization of the economy in the seventeenth and eighteenth centuries.

As early as the end of the sixteenth century the absolute power of the Ottoman sultan had already started to deteriorate; this took place with a

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including tax contractors, see Salzmann, *Tocqueville in the Ottoman Empire*; Salzmann, "An *Ancien Régime* Revisited."

93 More than Salzmann Abou-el-Haj emphasizes the autonomy of the local elite, the dissolution of lines of social differentiation, and the fragmentation of power, although researchers agree that all of these were outcomes of the redistribution policies of the Ottoman state and the privatization of the Ottoman economy toward the path of a modern state rather than signs of a "decline" in Ottoman state power in the seventeenth and eighteenth centuries. Abou-El-Haj, "Power and Social Order;" Abou-El-Haj, *Formation of the Modern State*. For the entrepreneurial relationship between the provincial elite and the Ottoman central government during these centuries, also see Molly Greene, *A Shared World: Christians and Muslims in the Early Modern Mediterranean* (Princeton, NJ: Princeton University Press, 2000); Khoury, *State and Provincial Society in the Ottoman Empire*; Tezcan, *The Second Ottoman Empire*. For a good review of the Ottoman historiography on the relationship of the central and provincial administration, especially for the Arab lands, see Dina Rizk Khoury, "The Ottoman Centre Versus Provincial Power-Holders: An Analysis of the Historiography," in *The Cambridge History of Turkey: The Later Ottoman Empire, 1603–1839*, ed. Suraiya Faroqhi (New York: Cambridge University Press, 2006).

94 Salzmann, *Tocqueville in the Ottoman Empire*, 20.

gradual shift away from the recruitment of slaves (*devşirme*) and toward the practice using both slaves and Muslim born subjects in vizierial households (*kapı*).[95] By the end of the seventeenth century, nearly half of the key posts in the central and provincial administration were filled by members of these vizier pasha households.[96] Their political power and influence showed itself in the deposition of sultans in 1687, 1703, and 1730 when the absolute majesty of the sultan was confronted by this vizierial oligarchy.[97]

The largest pool of clients who made up the lifelong tax-farming contract system was also this vizierial oligarchy. The primary clients of the central state auctions held in Istanbul and Edirne were the Ottoman central state elite in Istanbul, a group that consisted mostly of viziers, pashas, and the *ulema* with easy access to credit and political contacts. Yet, thanks to their retinues in the provinces, they also dominated the provincial auctions through their wealth and networks. And purchasing a lifelong lease was also a means for the Ottoman central elite to increase their household wealth by redistributing shares among the members of their retinues.[98] It is within this social milieu of competing ruling elites that the legal tensions, struggles, and alliances over imperial law in the eighteenth century must be analyzed.[99]

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95 Rifa'at Ali Abou-El-Haj, "The Ottoman Vezir and Paşa Households 1683–1703: A Preliminary Report," *Journal of American Oriental Studies* 94, no. 4 (1974).

96 Abou-El-Haj, *The 1703 Rebellion and the Structure of Ottoman Politics*, 7–9.

97 Ibid., Tezcan sees 1703 as a turning point in the struggle of the absolutists and the constitutionalists because the last *devshirme* levy took place on that date. According to him, it is an appropriate symbol for the end of the dynasty's attempts to sustain a patrimonial empire run by the slaves of the emperor. With the exception of the 1730 rebellion, for Tezcan the golden age of the Second Empire (1703–1826) functioned more peacefully since the royal authority accepted the power of the constitutional forces that surrounded it. Tezcan, *The Second Ottoman Empire*, 195.

98 Salzmann, "An *Ancien Régime* Revisited," 402–404.

99 In that sense, Tezcan's antagonistic division of the absolutists versus the constitutionalists and the law of the jurists versus feudal law is questionable, given its reductionist tendency to rigidly demarcate social classes in the seventeenth- and eighteenth-century Ottoman Empire. In his depiction, the constitutional forces (jurists, Janissaries, and local notables) appear to have almost no economic or political connections to the absolutist powers (the royal authority and the vizierial oligarchy). As a result, the laws regulating these two groups are depicted as mutually exclusive, i.e., the feudal law of the patrimonial order and the jurists' law of the market economy and constitutional forces. Tezcan, *The Second Ottoman Empire*. By contrast, this book attempts to demonstrate how they were intertwined in both the legal and the political spheres.

The *Kanun* as Legal Practice in the Eighteenth Century

Vanished Kanun or Vanished Kanunname? Provincial Law Books of the Seventeenth Century

We have observed that the Ottoman sultans codified and promulgated general and specific provincial law books during the sixteenth century, in an attempt to standardize the legal and administrative practices in the provinces through uniform statutes—a desirable and feasible endeavor given that the Ottoman central administration sought to establish political sovereignty and legal orthodoxy over local powers.[100] In the eighteenth century, however, there is no equivalent promulgation of law books. While provincial *kanunname*s continued to be sent during the seventeenth century whenever a new territory was added to the empire—though this was a rare event—the encoding of general law books ratified and promulgated by the sultan ceased in the sixteenth century. To our knowledge, no law book was compiled in the eighteenth century.

In Ottoman historiography, the absence of codified law books and the simultaneous rise of the ideological and social power of the *ulema*, mostly represented in literature in relation to the religious conservatism of the Kadızadeli movement, have long been read as the demise of the *kanun.*[101] Furthermore, Mustafa II's 1696 imperial decree banning the use of the term *kanun* adjacent to the *shari'a* has often been used to show that *shari'a* overcame the *kanun* in the late seventeenth and eighteenth centuries. For some scholars, this imperial decree symbolized a "contraction of *kanun* to the advantage of the *shari'a*,"[102] the "rejection of the *kanun*," and even an "upsurge of Muslim orthodoxy"[103] as a result of the domination of the religious echelons over the political authority.

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100 Meshal, "Antagonistic Sharī'as." Peirce, *Morality Tales*.

101 Barkan, the doyen of Ottoman *kanunname*, is a pioneer in connecting the disappearance of *kanunname* to the rise of "religious conservatism" with his statist, secularist understanding of the *kanun* as the legacy of customary Turkish law-making. Barkan, *XV ve XVI'ıncı Asırlarda Osmanlı İmparatorluğunda*; Barkan, "Kanunnameler." Uriel Heyd constructed a dichotomy between the "heyday of *kanun*" in the sixteenth century and the presumed decline of *kanun* in the eighteenth century as a result of the absence of empire-wide law books. Heyd, considered the doyen of Ottoman criminal law, made a scholarly edition of the Turkish text of the *kanunname* of Süleyman I (and of the Dulkadir penal code) with an annotated English translation. Although he did not publish the work in his lifetime, the manuscript was edited and published by V.L. Ménage who also appended Heyd's commentaries on the administration of Ottoman criminal justice based upon the *kanunname*s. Heyd, *Studies in Old Ottoman Criminal Law*.

102 Halil İnalcık, "Ḳānūn," *Encyclopaedia of Islam, Second Edition* (Brill online).

103 Heyd, *Studies in Old Ottoman Criminal Law*, 152–157; İnalcık, "Ḳānūn."

Whereas Tezcan's recent study asserts that the empowerment of Islamic jurisprudence did not necessarily mean the rise of religious fanaticism, in the final analysis, this study shares the basic premises of previous scholarship on the triumph of Islamic jurisprudence over the *kanun* during the seventeenth and eighteenth centuries.[104] Like revisionist scholarship that challenged these premises from a variety of angles,[105] in this chapter I contend that in the eighteenth century the *kanun* was still a prevalent legal force that was diffused into politico-legal culture rather than being fixed and codified into a uniform law book.[106] This fluidity of the *kanun* (as well as of Islamic jurisprudence) was consistent with the economic and administrative reconfiguration of Ottoman power toward the oligarchic rule of the notables.

Alongside assertions about the absence of empire-wide law books in the seventeenth and eighteenth centuries, an additional argument has been made to substantiate the claim that the *kanun* was discarded from the late seventeenth century onwards: Namely, the interpretation that clear indications of the

104 Tezcan conceptualizes the "political empowerment of jurists' law" not as a sign of fanaticism, but as a political contestation between jurists and the dynastic authority. He thus interprets Mustafa II's denunciation of the *kanun* in favor of the *shari'a* as an absolutist "full-fledged claim on the Sharia." For Tezcan, this was one of the last attempts of the absolutists to enter the domain of jurists's law, i.e., Islamic jurisprudence. In this sense, Mustafa II could "facilitate the expansion of the role played by the dynasty in the articulation of jurists' law that was crucial for controlling the affairs of the ruling class." Tezcan, *The Second Ottoman Empire*, 27–30, 43–45.

105 Abou-al-Haj, the pioneer of this revisionist scholarship, brilliantly revealed various fluid and ad hoc uses of the *kanun* in the period between 1600 and 1800, a period that he called the "transitional period" on the path to the formation of the modern state. Abou-El-Haj, "Power and Social Order." For more regional studies with the same perspective on *kanun* that I concentrate on in this chapter, see Greene, *A Shared World*; Dina Rizk Khoury, "Administrative Practice between Religious Law (Shari'a) and State Law (Kanun) on the Eastern Frontiers of the Ottoman Empire," *Journal of Early Modern History* 5 (2001). In spite of not specifically concentrating on the issue of *kanun*, other studies challenge the conventional historiography on the nature of the early-modern state by demonstrating the various economic and administrative techniques of Ottoman power in the seventeenth and eighteenth centuries, see Darling, *Revenue-Raising and Legitimacy*; Hathaway, "Rewriting Eighteenth-Century Ottoman History;" Salzmann, *Tocqueville in the Ottoman Empire*.

106 Haim Gerber made this observation in his study on Ottoman law of the seventeenth and eighteenth centuries. He claims that *kanun* survived in land and penal law even in the eighteenth century, despite the fact that it was in crisis as an ideology. Gerber, *State, Society and Law in Islam*, 66. Thus, he highlights the application of law and the judicial processes more than ideological struggles in the political sphere. Furthermore, he even states that "it is impossible to talk about the decline of the *kanun* because, as we have seen, the penal law of the *shari'a* is built into the *kanun*." Ibid., 72.

decline of the *kanun* can be found in the abolishment of *kanun*-based taxes and criminal fines and the transformation of state land (*miri*) into private property parallel to the principles of *shari'a* in some of the provincial *kanunname*s of the second half of the seventeenth century—especially those of Crete in 1670 and Mytilene (Midilli, Lesbos) in 1709–10.[107] Yet, the privatization of land, i.e., the transformation of state land (*miri*) into private property and the abolishment of *kanun*-based taxes in the provincial *kanunname*s of the late seventeenth century was in fact an economic and political strategy of the ruling elite rather than a victory of the *shari'a* over *kanun*. The Ottoman conquest of Crete took place relatively late, starting in 1645 and ending with the surrender of Candia in 1669. Upholding established patterns of private property and eliminating burdensome taxes in newly conquered frontier lands were, first, an Ottoman strategy of population resettlement and a cultivation policy.[108] From another perspective, it was nothing more than an acknowledgment of the power of the local elite by the Ottoman central government in the age of powerful local notables. In that sense, it also shows how the *kanun* could be adopted to local circumstances.[109]

The policy of registering land as private property was in perfect conformity with the new Ottoman land regime based on tax-farming, a practice that the Ottoman central elite benefited from most during the course of the seventeenth century. Registering land as private property that was transferable, inheritable, and subject only to traditional Islamic taxes such as the tithe (*öşr*) was a practice usually followed by reformist Köprülü viziers.[110] The privatization of land in Crete through the *kanunname* was in fact a triumph of the vizierial Köprülü household who fought the sultan for long-term

107 Heyd, *Studies in Old Ottoman Criminal Law*, 154–155.

108 Greene, *A Shared World*, 78–140. Crete was mostly populated by Christian Greeks, therefore, the Ottomans wanted to encourage the local population to convert to Islam or attract Muslim settlers by offering lower taxes as an incentive, given that they did not want to resort to forcing Muslim populations to migrate from other parts of the empire. See, Vassilis Dimitriadis, "Conflicts of Interests in Crete between Local Muslims and the Central Government in Istanbul During the Greek War of Independence, 1821–28," in *Ottoman Rule and the Balkans, 1760–1850: Conflicts, Transformations, Adaptation*, ed. Antonis Anastasopoulos and Elias Kolovos (Rethymno, Greece: University of Crete, 2007), 206.

109 Khoury shows us how the Ottoman administration made adjustments in the set of administrative laws (*kanunname*) that they introduced in Basra in the sixteenth century to accommodate changing socio-economic configurations in the seventeenth century. Khoury, "Administrative Practice between Religious Law (Shari'a) and State Law (Kanun)," 313–321.

110 Khoury, *State and Provincial Society in the Ottoman Empire*, 320.

control over revenues.[111] Indeed, Greene has brilliantly revealed how, in 1695, the acknowledgment of private ownership of land in Crete, simultaneously with the introduction of lifetime tax-farming contracts (*malikâne*)—which swiftly became hereditary—was in fact most beneficial to the grand vizier Köprülü Fazıl Ahmed Pasha who used such new fiscal and administrative reforms to expand his own grandee household by entitling his entourage to own land.[112] Thus, by using the potent language of *shariʿa* in which private ownership was encouraged through inheritance laws, the *kanunname* of Crete allowed for unprecedented private control over land.[113] Hence, "the Cretan kanunname, then, represents not fundamentally the 'resurgence of Islam' but rather an extraordinary victory on the part of the grandee household."[114]

We see similar land regime practices in other "frontier" territories, such as Basra, where the Ottoman Empire had difficulty establishing ideological and administrative control. When Basra finally fell under Ottoman control quite late in 1669 (the same year in which Candia in Crete was conquered), the Ottomans did not change the patterns of private ownership among the strong commercial, political, and agrarian/tribal landowning elite, and incorporated this principle into the purview of the *kanun*.[115] Khoury also demonstrates a similar usage of *shariʿa* for political and economic purposes in Mosul in the eighteenth century. She shows that, after the introduction of tax-farming in Mosul, small proprietors of rural rents made a rhetorical use of *shariʿa* in their struggle against some extended households who monopolized *malikâne* holdings. ʿAbdallah b. Ahmad al-Mosuli, a scholar and a member of this small band of proprietors of rural rents, claimed that the state, as the trustee and guardian of "God's creatures" and their land, should prevent the *malikâne* holders from forcing peasants to sell their usufruct rights to the former. Khoury indicates that al-Mosuli, being one of the small landowners, was obviously concerned

111 Greene, *A Shared World*, 27.

112 Ibid., 27–32.

113 Ibid., 31. Khoury elucidates the ways in which the new form of revenue ownership, i.e., the *malikâne* system, resembled *shariʿa* definitions of heritable property: "the inheritance of titles to revenue was regularized and transfer of revenue was recognized." Khoury, "Administrative Practice between Religious Law (Shariʿa) and State Law (Kanun)," 322.

114 Greene, *A Shared World*, 27–28. Greene also discusses the possibility of religious motivation behind Köprülü's promotion of *shariʿa*-based private ownership and taxes, given that he had close connections to the Kadızadelis, the Muslim activists. However, she claims that the Kadızadelis were not interested in the relationship between the subjects, the sultan, and land ownership.

115 Khoury, "Administrative Practice between Religious Law (Shariʿa) and State Law (Kanun)," 318.

about the monopolization of revenue by a limited number of the elite as a result of the peasants' selling their usufruct rights. Khoury's discussion therefore shows that their resort to the *shariʿa* was not necessarily done in order to criticize the *kanun,* for instance for introducing a tax-farming system, but was done for practical reasons by beneficiaries of the system, in an effort to attack more privileged members and legitimize their own cause.[116]

In other words, the *shariʿa* and the *kanun* were part of the same legal domain in which the main beneficiaries of the economic and political system did not necessarily consider them to work in dichotomy. Rather, as Khoury intelligently demonstrates, up until the nineteenth century, within the parameters of a shared vocabulary, the *shariʿa* was "often a discursive means used by local jurists to challenge the legitimacy of particular points of state law, not its existence."[117] In this sense, resorting to the *shariʿa* was not a sign of the "upsurge of Muslim orthodoxy," as Heyd argues, but rather the deployment of a legitimate legal force by the ruling elite to expand economic and political power that had been granted to them earlier through the *kanun* and *siyasa*. At the same time, the "privatization" of the *kanun* through the acknowledgment of Islamic inheritance law and Islamic taxes was not merely an ideological tool of "absolutists" to "style themselves as champions of the *shariʿa* in the late seventeenth century."[118] The boundaries between public law and private law have never been so strict[119] and these latter provincial *kanunname*s prove that both the *fiqh* of jurists and imperial law were used in rather flexible ways in the hands of the ruling elite, be they viziers or the *ulema*. Hence, to leave the sphere of the *kanun* flexible, based on "ad hoc regulations," without ossifying it under quasi-universal codifications was in fact to the advantage of the oligarchic rule of the notables in a period when economic and social power relations were constantly being reconfigured.[120]

Such a perspective enables us to offer an alternative reading of Mustafa II's imperial decree promoting the *shariʿa* and banning the use of the *kanun* as an ideological tool rather than a reflection of legal practice in the late

116 Ibid., 323.

117 Ibid., 329–330. She argues that the elastic margins of the *shariʿa* and the *kanun* were seriously challenged in the nineteenth century when state law, in the 1858 Land Code, homogenized local court practices in favor of *kanun* and thus polarized *shariʿa* advocates into making stricter interpretations of traditional definitions of ownership with reference to scripture. Ibid., 324–326.

118 Tezcan, *The Second Ottoman Empire*, 29.

119 Tezcan, on the contrary, assumes that *kanun* practice created a strict boundary between private and public laws. See, ibid., 30–35.

120 Abou-El-Haj, "Power and Social Order," 79–86.

seventeenth century. There is no doubt that Mustafa II's decree reflects the powerful influence of the *şeyhülislam* (the chief mufti) Feyzullah Efendi on government policies. Feyzullah, who was Mustafa's preceptor when he was a prince and later worked as the sultan's unofficial personal consultant during his reign, extended his own household and retinue during his office. As indicated earlier, the central *ulema* were also important clients of tax contracting. Through nepotism and tax-farming contracts Feyzullah made the office of *şeyhülislam,* as well as other provincial religious posts including those of mufti, judge, and military judge (*kadıaskerlik*) almost hereditary.[121] Just as grand vizier Köprülü Fazıl Ahmed Pasha used the *kanun* in Crete to extend his own grandee household through semi-private land-farming practices, Feyzullah's personal effect on Mustafa II in emphasizing the *shari'a* over the *kanun* can be seen as his own means of using patrimonial prerogative to empower his own entourage vis-à-vis the grand vizier's household.

Moreover, Mustafa II's resort to the *shari'a* and the chief mufti was a struggle against a dominant political oligarchy that overcame the "absolute" power of the sultan during the course of the seventeenth century. "Mustafa II tried to assert his prerogatives to regain "absolute" political control by appealing to the canon law," as Abou-El-Haj points out.[122] With regard to this, Mustafa II's imperial decree can be read as an ideological block on the part of the sultan and the *ulema* in their struggle against the ever-expanding power of the grand vizier in government.[123] In this regard, the constitutional struggle was not a struggle between fixed, never-changing social classes. It was, rather, a struggle in which the royal household (dynasty), vizierial (the military administrative class), and the *ulema* households (the class of religious dignitaries) continually changed positions according to new constitutional agreements. In other words, those parties who entered into alliances with the dynasty, be they viziers or *ulema*, did not necessarily support absolute authority, but rather pushed the dynasty

121 Madeline C. Zilfi, "Elite Circulation in the Ottoman Empire: Great Mollas of the Eighteenth Century," *Journal of the Economic and Social History of the Orient* 26, no. 3 (1983): 340–341; Zilfi, *The Politics of Piety*, 215–220.

122 Abou-El-Haj, "Power and Social Order," 83.

123 Murat Akgündüz reports that a gossipy entry in an anonymous chronicle on Mustafa II's reign, entitled *Kıt'a min Tarih-i Al-i Osman*, states that Feyzullah warned the newly appointed grand vizier, Elmas Mehmed Pasha (d. 1697), not to submit any issue to the sultan without his prior permission. As a result, the grand vizier applied to him several times during the day and night to ask for his permission. Murat Akgündüz, *XIX. Asır Başlarına Kadar Osmanlı Devleti'nde Şeyhülislamlık* (Istanbul: Beyan, 2002), 93.

into a new constitutional arrangement.[124] In that sense, the use of the jurists' law in Mustafa II's struggle against the grand vizier or the *ulema* as a class in general[125] can be read rather more as a rhetorical tool than an attempt to intervene in legal practice.

"Private" Compilations of Law Books in the Seventeenth Century

The fact that the law became a tool in the legitimacy struggles and/or constitutional agreements of diverse social classes in the seventeenth and eighteenth centuries is also evident in the "private" law books compiled in this period. These "private" law books reveal that from the mid-sixteenth century on toward the eighteenth century, the *kanun* became the "common property" of not only legal scholars, but also the administrative and military bureaucracy.[126] While the sultan no longer maintained an absolute monopoly over the *kanun* after this point, bureaucrats and the *ulema* created a discursive field in which both parties created, through the discussion of the *kanun*, reform agendas for the legal administration of the empire.

In spite of the absence of the issuance of general law books after the sixteenth century, a new genre of compiling "private" law books arose in the seventeenth century. The members of the Ottoman legal bureaucracy compiled law books, based on both old (*kadim*) and contemporary statutes from imperial registers, to be implemented in the Ottoman courts and councils. The *Risale-i Kavanîn-i âl-i Osman der hulasa-i mezamin defter-i divan* by Ayn' Ali Efendi, secretary of the Register of Imperial Revenues (*Defter-i Hakani Emini*), in 1018/1610[127] and the *Telhisü'l-beyan fî kavanîn-i âl-i Osman* by the historian

124 Baki Tezcan's argument that this was the last attempt of the royal authority to establish its absolute power and control the ruling class by claiming the jurists' law can also be read as a temporary constitutional agreement established between the *ulema* and the sultan against the grand vizier; this was altered by other constitutional arrangements during later political crises. In that sense, the "absolutist" versus "constitutionalist" struggle was not necessarily based on an absolute cleavage between two monolithic blocks, i.e., the political authority and the *ulema*, but on various constellations of power among different classes. For Tezcan's argument, see Tezcan, *The Second Ottoman Empire*, 28–29, 36–45.

125 Tezcan interprets Mustafa II's denunciation of the *kanun* in legal discourse and his claim over the jurists' law as an attempt at "pulling the carpet out from under the feet of the *ulema* who took their authority from their competence in jurists' law." Ibid., 43–44.

126 Buzov, "The Lawgiver and His Lawmakers," 130–131.

127 In fact, Ayn' Ali Efendi's *Risale* was ordered by the grand vizier Murad Pasha. It was modified by Ayn' Ali Efendi, who added amendments about the salaries of state officials of the time and resubmitted it to the grand vizier in 1018. Ayn' Ali Efendi, *Kavânîn-i âl-i Osman*

Hezarfen Hüseyin Efendi in 1086/1675–76,[128] and the law book of Abdurrahman Pasha, the head of chancery (*tevkiʿi*), in 1676,[129] can be counted within this genre.[130] In the second quarter of the seventeenth century there was also a compilation by an unknown clerk of the *kadı* court; this work brought together statutes from previous *kanunname*s, contemporary imperial orders, and *fetva*s (legal opinions of muftis).[131] Whether they should be considered "private," "semi-official" or "official" law books is a contested issue among scholars;[132] it is worth mentioning that such a debate still reflects a restricted and sultan-centric understanding of the *kanun*. These compilations, be they private or semi-official, represent the common enterprise of the construction of an imperial constitution. Although we do not know to what extent these

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der hülâsati mezâmin-i defter-i dîvân (Istanbul: Tasvir-i Efkâr Gazetehanesi, 1280 [1863]), 83–87.

128 For detailed information about this work, see Franz Babinger, *Osmanlı Tarih Yazarları ve Eserleri*, trans. Coşkun Üçok (Ankara: Kültür Bakanlığı Yayınları, 1992), 253–255; Barkan, *XV ve XVI'ıncı Asırlarda Osmanlı İmparatorluğunda*, xxiii–xxxiv.

129 Tevkiʿi Abdurrahman Pasha, "Tevkiʿi Abdurrahman Paşa Kanunnamesi," *Milli Tetebbular Mecmuası*, no. 3 (1331/1913).

130 Ferguson makes an intelligent analysis of how Ottoman authors of this period deployed archival sources to create a reform agenda that differed from the advice literature of the previous generation. Ferguson, "Genres of Power," 109–116.

131 This compilation, referred to as the "New Law Book" (*Kanunname-yi Cedid-i Sultani*) because of its synthetic character of combining old and new statutes, is thought to have been compiled in 1084/1673, since most versions of this *kanunname* end with an imperial order dated 1673. İnalcık, "Kanunname." Heyd considers this compilation "the most comprehensive Ottoman penal law" as it contains about one hundred statutes of criminal law and a number of sections dealing with market regulations. Heyd, *Studies in Old Ottoman Criminal Law*, 32–33. We do not know how much this compilation was used in practice although its compiler, who was a clerk in a *shariʿa* court, mentioned in the preamble that he compiled it in order to inform local judges on customary law (*kavanin-i örfiyye*). For the preamble, see Barkan, *XV ve XVI'ıncı Asırlarda Osmanlı İmparatorluğunda*, xxiv–xxvi.

132 For example, while Heyd and İnalcık consider *Kanunname-yi Cedid-i Sultani* a continuation of the tradition of the sultans issuing comprehensive *kanunname*s, Barkan ranks it with other private compilations of statutes that concerned specific issues of governmental organization, such as the *kanunname* of Tevkiʿi Abdurrahman Pasha. See, İnalcık, "Kanunname;" Heyd, *Studies in Old Ottoman Criminal Law*, 32–33; Barkan, *XV ve XVI'ıncı Asırlarda Osmanlı İmparatorluğunda*, xxiv–xxvi. Similarly, the *kanunname* of Tevkiʿi Abdurrahman Pasha was considered semi-official since it was compiled by the head of the chancery (*nişancı* or *tevkiʿi*), Tevkiʿi Abdurrahman Pasha, by order of the grand vizier Kara Mustafa Pasha in 1676. For an explanation of this compilation and its various categorizations, see Akgündüz, *Osmanlı Kanunnameleri ve Hukuki Tahlilleri*, vol. 1, 90; İnalcık, "Kanunname;" Heyd, *Studies in Old Ottoman Criminal Law*, 209 n. 2.

compilations were used in legal practice, they were compiled for use in legal practice, at least according to what their compilers advocated. In that sense, they represent how the ideological and pragmatic reform agenda overlap through law. Thus, it is worth seeing how members of the legal bureaucracy appropriated a *kanun* language as a legitimate field to discuss imperial politics.

The law book of Abdurrahman Pasha, who was the head of chancery (*tevkiʿi*) in the government of the grand vizier Kara Mustafa Pasha, stands out from other law books. This compilation, which was prepared by the order of the grand vizier in 1676, concentrated mostly on issues of state organization and governmental order. As a law book it was a panegyric of the grand vizier's quasi-omnipotent legal authority over "*shariʿa*" related matters and the *kanun*: As the "representative plenipotentiary" (*vekil-i mutlak*) of the sultan, he was responsible for the "whole of religious and governmental matters and of the order of the state of affairs of the sultanate."[133] He had also the authority to give an imperial decree (*hakim-i sahib-i ferman*) for "the infliction of the fixed penalties of the *shariʿa* (*hudud*), which included retaliation (*kısas*), imprisonment, banishment, and various forms of discretionary punishment (*taʿzir*), capital or severe corporal punishment (*siyaset*) as well as the authority to hear cases, implement the laws of *shariʿa* and remove wrongdoings and oppression (*mazalim*)."[134] As a protégé of Kara Mustafa Pasha, Abdurrahman Pasha celebrated not only the grand vizier's competence in *siyasa*, but also that of the provincial governors who could rule in their provincial councils according to both the "*shariʿa*" and the *kanun*.[135] The celebration of the juridical power of the grand vizier and its ruling elite by Abdurrahman Pasha as a member of the grandee network is a good example of the way the forces of oligarchic government formed coalitions at the end of the seventeenth century.

Yet, the above-mentioned unknown clerk of the *kadı* court, who compiled the last comprehensive law book in the second half of the seventeenth century, also invoked both the *kanun* and the "*shariʿa*" with reference to local judges:

> The judges of the sacred law are not restricted to hearing *shariʿa* cases only but are appointed and ordered to decide disputes and terminate litigation in regard to both *shariʿa* and *ʿörf* matters. Therefore, just as on

133 Tevkiʿi Abdurrahman Pasha, "Tevkiʿi Abdurrahman Paşa," 498.

134 Tevkiʿi Abdurrahman Pasha, "Tevkiʿi Abdurrahman Paşa," 498. I also benefited from Uriel Heyd's English translation of the passage in *Studies in Old Ottoman Criminal Law*, 224.

135 See "The Legal Code of Provincial Governor" (*Kanun-ı Mir-i Miran*) in Tevkiʿi Abdurrahman Pasha, "Tevkiʿi Abdurrahman Paşa," 528.

> *sharīʿa* questions *fikh* works are studied, so it is considered (their) duty in regard to *ʿörf* matters to study the registers of the Sultan's *kanun*s.[136]

In fact, the compiler states that he compiled the previous *kanun*s as a manual for the local judges to use side by side with their manuals of Islamic jurisprudence.[137]

Though here I do not study the other compilations and treatises that started to diverge from advice literature toward a more reform-oriented literature,[138] we can identify some common denominators in these seventeenth-century compilations. First, a shift took place, from the persona of the sultan to a more abstract notion of governance and politics. Among these common denominators, we note that the "political" appears as a way of critiquing particular policies of the government; scholars consider these critiques "the dissolution of the moral discourse over legitimacy"[139] or the "gradual abandonment of [an] ethical approach."[140] Yet, defining legitimacy through justice and the reverse can also be read as part of the process of bureaucratization and institutionalization that enabled compilers of law books to envisage a reform agenda through practical administrative measures.

More importantly, these reform agendas were created by deploying administrative sources such as the codes, registers, and cadastral surveys, as points of reference for good administration. In other words, *kanunname* became the legitimate genre and a nostalgic model in which practical criticism was offered to the government. Thus, as Ferguson states, they "systematized the workings of state, and objectified former practices as institutional foundations."[141] By doing so, they "activated an archival history of the Empire" and "their work embodied a shift from statecraft premised on the character and actions of the

136 As translated in Heyd, *Studies in Old Ottoman Criminal Law*, 216. The original transcription is as follows: "Zira hükkam-ı şer-i mutahhar mücerred umur-ı şerʿiyye istimaʿına münhasır değillerdir belki cemiʾan umur-ı şerʿiyye ve ayin-i örfiyyede katʿ-ı nizaʿ ve fasl-ı husumet için mevzuʿ ve memurlardır. Binaenʿalazalik mesail-i şerʿiyyede kütüb-i fikhiye tetebbuʿ olunduğu gibi umur-ı örfiyede dahi ceraid-i kavanin-i sultaniyye tetebbuʿu mültezimdir," in Barkan, *XV ve XVI'ıncı Asırlarda Osmanlı İmparatorluğunda*, xxv, n. 9, item 3.

137 I discuss in detail his and other compilers' methods of collecting these *kanun* statutes in the following pages.

138 For a more detailed analysis of the discursive shift in Ottoman political writing, see Ferguson, "Genres of Power;" Tuğ, "Gendered Subjects."

139 Hagen, "Legitimacy and World Order," 80.

140 Sariyannis, "The Princely Virtues," 136.

141 Ferguson, "Genres of Power," 116.

Sultan toward an abstracted and bureaucratized vision of government that best describes the Ottoman Empire in the eighteenth century."[142]

Jurists' Discourse on Siyasa in the Eighteenth Century

The question of whether or not the supposedly "rhetorical" impact of the *ulema* in the state discourse on *kanun*—as seen in Mustafa II's ban of the use of the term *kanun* adjacent to the *shari'a*—substantially affected eighteenth-century Ottoman legal practice is still worth considering. The late seventeenth-century provincial law books for newly-conquered territories reveal that the transformation of state land into private property through *shari'a*-imposed taxes (rather than customary taxes) was a tool in the hands of the ruling elite, be they grandee or *ulema* households, to expand their material interests in accord with the tax-farming policies of the imperial state. The discursive analysis of the "private" compilations of law books of the same period also shows that a repertoire of administrative sources such as the registers and cadastral surveys were utilized by the reformist treatise writers, and that a discourse of *kanun* rather than of "*shari'a*" was appropriated to legitimize their bureaucratic agenda.

Yet, the sources mentioned above might not be considered sources of legal practice since they are mostly textual sources—especially the "private" compilations—and their application is debatable. In order to see the influence of the *kanun* or the "rise of the jurists' law"[143] in legal action of the eighteenth century, we must closely examine various elements of legal practice, such as *fetva*s, imperial decrees and petitions, as well as court records, as I attempt to do here. Only through such an examination can we gain a better insight into the extent to which the *kanun* was utilized in the Ottoman legal sphere in the eighteenth century.

The important question we ask here is, did the increase in political and economic power of the upper echelons of the *ulema* substantially influence the decision-making mechanisms in the Ottoman legal system during the seventeenth and eighteenth centuries? That is, did the personal or class interests of the upper *ulema*, that might, on a rhetorical basis, have influenced the sultan's

142 Ibid.

143 Tezcan's claim about the political and legal empowerment of the jurists' law from the seventeenth century onwards rests on non-legal sources, such as chronicles and advice literature, and on a very problematic assumption that the *kanun* established a rigid division of public and private law. For critiques of Tezcan's arguments on Ottoman law, see James E. Baldwin, "Second Ottoman Empire: Political and Social Transformation in the Early Modern World," *Journal of Early Modern History* (2012): 451–453; Ebru Boyar, "The Second Ottoman Empire: Political and Social Transformation in the Early Modern World," *Journal of Islamic Studies* 23, no. 3 (2012): 394–397.

discourse on *kanun*, have a systemic affect on the legal system, the main venues of which were the Imperial Council and the local *kadı* courts? Was there such a direct link between the interests of the upper *ulema* and the lower *ulema*, that is, between the provincial *kadı*s and the muftis who administered justice according to the directions of the imperial power?

Questions on class interest and its relationship with legal practice are difficult to answer in the scope of this study. Material and ideological relationships between the upper and lower echelons of the *ulema* have not yet been studied closely, despite Zilfi's work on the eighteenth-century *ulema*, which revealed for the first time how certain *ulema* families, like that of Feyzullah (Feyzullahzades), expanded their class interests through patrimonial prerogative.[144] Furthermore, assuming a direct correlation between the empowerment of *ulema*, in particular its upper echelons, as a class, and the ideological prevalence of Islamic jurisprudence, would enable us to make an easy jump from material interests to ideological discussions. Indeed, high-ranking Ottoman *ulema*, who also established dynastic households and were integral parts of the ruling elite during the seventeenth and eighteenth centuries,[145] usually prioritized the *raison d'etat* over Islamic principles and willingly participated in decisions which were sometimes contradictory to *shari'a* principles.[146]

My research on the *fetva* collections of the eighteenth century does not substantiate the supposed "conservatism" of the *ulema* on the *kanun* and on the politico-administrative jurisdiction of Ottoman political power. They had no reservations in referring to the almost omnipresent authority of the "government" in the administration of justice. For example, Yenişehirli Abdullah (Abdullah Ebü'l-Fazl Abdullah bin Mehmed), who served as *şeyhülislam* between 1718 and 1730, did not hesitate to repeatedly acknowledge the full judicial authority of the political power. The "guardian of the command" (*veliyyü'l-emr*)—meaning either the sovereign or his deputies acting on his behalf such as the governor—punished criminals with capital punishment (*katl*) in accordance with his decree (*emr-i veliyyü'l-emr*).[147] In the chapter on

144 Zilfi, *The Politics of Piety*.

145 For the most prominent dynastic *ulema* families during the seventeenth and eighteenth centuries, see ibid., especially the table on 49–50.

146 Uriel Heyd, "The Ottoman 'Ulemā and Westernization in the Time of Selīm III and Maḥmūd II," in *The Modern Middle East,* ed. Albert Hourani, Philip Khoury, and Mary C. Wilson (London: I.B. Tauris, 2004), 96.

147 The *fetva*s of *şeyhülislam* Yenişehirli Abdullah were compiled and rearranged according to classic *fiqh* categorizations by his own *fetva emini* Mehmed Fıkhi el-Ayni during the *şeyhülislam*'s lifetime, in 1733–43. I used the first printed version from the nineteenth century. *Behcetü'l-Fetava*, as one of the authentic *fetva* collections dedicated to the *fetva*s of

regular *hadd* punishment he even devoted a separate subsection entitled *Nevi' fi'l-ta'zir bi'l-katl* ("The kind of discretionary punishments containing the death penalty") to crimes that were punishable by death on the sovereign's discretionary authority.[148]

In this way, Yenişehirli Abdullah opened a legitimate space for politico-administrative jurisdiction in the sphere of *shari'a*. In fact, he did not diverge from the classical jurisprudential understanding that granted this prerogative to the sovereign through the principle of *ta'zir* as noted. Since those areas defined in the eighteenth-century *fetva* collections as deserving political intervention concerned banditry and sexual violence are analyzed in the following chapters, here suffice it to say that an eighteenth-century *şeyhülislam* like Yenişehirli Abdullah had no reservations in attributing to the political authority a privileged legal competence that would be used according to the principles of *siyasa* and *ta'zir*. Yenişehirli's *fetva*s do not reveal any vigilance in highlighting *shari'a* over political jurisdiction. Rather, *shari'a* and the government as the "guardian of the command" were depicted as being in perfect harmony in his ideal picture.

Archiving Practices as a Source for Kanun

Here we must ask an important question: in the eighteenth century, what were the sources of *kanun*, in the absence of an official empire-wide applied law book? To answer this question, I analyzed the petitions and imperial decrees written in response to the former petitions, in which the *kanun* was explicitly referred to as a tangible legal force. Yet, before looking at these documents in detail, it is necessary to comprehend the true nature of *kanun* practice in the Ottoman Empire.

The *Kanun* was in fact an ever-evolving amalgam of the registers recorded and kept by professionals and administrators both in the center and the provinces. This had long been the case during Ottoman times: While before the

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a specific *şeyhülislam* was considered an authoritative source and was frequently used during subsequent decades of the eighteenth century. For more detailed information on *Behcetü'l-Fetava*, see Ahmet Özel, "Behcetü'l-Fetava," in *TDV İslam Ansiklopedisi* (Istanbul: TDV Yayınları, 1992).

148 See the sub-section of *Nevi' fi'l-ta'zir bi'l-katl* within the section of *Bab al-ta'zir* under the chapter of *Kitabu'l-hudud* in Yenişehirli Ebü'l-Fazl Abdullah, *Behcetü'l-Fetava ma'an-Nukul*, ed. Mehmed Fıkhi el-Ayni (Istanbul: Dârü't-Tıbaati'l-Amire, 1849/1266), 145–153. The issue of why this section was located directly under fixed penalties is especially interesting in coming to an understanding of the punishment for sexual crimes in the Hanafi school of Islamic law and particularly in the Ottoman Empire. This issue is discussed extensively in Chapter 5.

sixteenth century those population groups and administrators who received imperial decrees were responsible for preserving the decrees of the current sultans to present them to the future ruler in order to continue the terms of their agreements, in Süleyman's time there was a "compilation, consolidation and systematization" of the *kanun* through regular recording and archiving registers.[149] While many of these registers were deposited and appropriated by the central administration and the sultan, some, such as *waqf* deeds, were the property of private parties or the provincial administrators or the guilds (such as the *ruznamçe* registers of the *kadıasker* of Rumeli). Thanks to this very systematization—which was not only a result of the administrative bureaucracy of Sultan Süleyman, but also Ebussuud's success in reclaiming the sovereignty of the law, Buzov argues that in the late sixteenth and the seventeenth centuries the law became common property, rather than the property of sultan.[150]

In other words, the whole practice of "archiving" the imperial decrees, i.e., the circle of applying to previous imperial decrees for a precedent or to check the accuracy of the petitions, the issuing of new imperial decrees to be sent to the provincial authorities, and the incorporation of the new ones into registers, constituted the sources of *kanun* in eighteenth-century legal practice, as we see in detail in the following chapters. Ömer Lütfi Barkan, the doyen of studies on *kanun* in the Ottoman state, also calls our attention to this very simple fact, which has been neglected by those who advocate the idea of the decline of the *kanun* in the eighteenth century: In legal practice the "real sources" of *kanun* were in fact this archiving practice rather than even the general *kanunname*s promulgated by the sultans in the sixteenth-century. He shows that different Imperial Council registers containing imperial decrees, parts of the diverse provincial *kanunname*s recorded in these registers, and the fascicles kept in pouches in various departments of the Imperial Council in fact constituted the real sources of the *kanun* in legal practice even in earlier centuries when general *kanunname*s were available.[151]

149 Buzov, "The Lawgiver and His Lawmakers," 135–139. Buzov doubts the influence and practical use of the compilations, such as the Celalzade's copy of the Süleyman's *kanunname* that was widely distributed to the provincial administrators. She claims that Celalzade's compilation, with its organization in chapters and sub-chapters, was used as a model for the following provincial law books. With regard to this, she rejects the very categorization of "general *kanunname*" and their central role in the formation of the *kanun* law. Ibid., 127–129.

150 Ibid., 139.

151 He substantiates his argument by demonstrating that the copies of the officially compiled general *kanunnames* kept in the palace library contained margin notes (*derkenar*s) and explaining that the missing parts of these compilations were continually revised and

A closer examination of the preambles of compilations of law books prepared by private initiative during the seventeenth century also confirms this fact for later periods. The *kanunname* compiled by the unknown clerk in the second quarter of the seventeenth century gives us two important insights into how things worked in legal practice: First, the compiler states that the *kanun*s that he compiled were available to and continuously utilized by officials in the Imperial Council. So, he wanted to prepare such a compilation to have a manual of customary/sultanic law for local *kadı*s who were responsible for applying both "*shari'a*" and *kanun*. Second, he mentions that in compiling his law book he applied current registers of certain customary matters and the imperial orders (sent to his local court) to some *kanun* booklets.[152] Thus, his preamble not only demonstrates the transparency of the *kanun* for the Imperial Council personnel, but also the "real" sources of the *kanun*, that is, current legal practice, for his task of compiling these works as a court clerk.

Similarly, other "private" compilations such as *Telhisü'l-beyan fî kavanîn-i âl-i Osman* by the historian Hezarfen Hüseyin Efendi in 1086/1675–76[153] and *Risale-i Kavanîn-i âl-i Osman der hulasa-i mezamin defter-i divan* by Ayn' Ali Efendi, secretary of the Register of Imperial Revenues (*Defter-i Hakani Emini*) in 1018/1610[154] were also based on an examination of the "old and new registers" and of the previous *kanunname*s kept in the Imperial Council. For this reason, *kanunname* compilations were only snapshots of the ongoing and ever-changing *kanun* practice rather than fixed determinants of the *kanun* sphere. In this sense, if the attempt at intervention by Mustafa II and *şeyhülislam* Feyzullah Efendi into the legal practice of *kanun* had been successful,[155] it would have meant much more than the absence of a codified *kanunname* for the eighteenth century.

Thus, neither the officially promulgated "general" and provincial law books nor the "private" compilations should be considered as the one-and-only

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amended according to the most recent registers of imperial decrees and fascicles of provincial and specific *kanunname*s in the departments of the Imperial Council. Barkan, *XV ve XVI'ıncı Asırlarda Osmanlı İmparatorluğunda*, xxix–xxxiv.

152 "… bu fakir ve hakir-i kemterîn ezell-i îbâd mehâkim-i şer'iyyede ketb-i vesaik-i mer'iye hizmetinde olmağla ba'zı risalât-ı kanuniyye ve zevabat-ı mesail-i örfiyye ve ba'zı varid olan evamir-i sultaniyeden ihrac ve asıl nusha-i mürettebeye idrâc edip…" Ibid., xxv, n. 9, item 5.

153 See n. 128.

154 See n. 127.

155 Soyer's research on seventeenth-century Imperial Registers indicates that references to the *kanun* and the *shari'a* in legal documents of the Imperial Council continued throughout the seventeenth century as well. See, Soyer, "XVII. yy. Osmanlı Divan Bürokrasisi'ndeki."

sources of the *kanun*. Rather the *kanun* was a cumulative legal practice guided by the current registers and imperial decrees which were produced and disseminated by the Imperial Council. Hence, looking for one codified *kanunname* as *the* source would be misleading in an analysis of the *kanun* in the legal practices of the eighteenth century, as it would be for the previous periods too. Thus, considering the lack of such compilations of the *kanunname* as a decline in the practice of the *kanun* in the eighteenth century also blinds us to the fluid, multi-dimensional, and ongoing application of the *kanun* in the mid-eighteenth century.

* * *

Identifying the social tensions and cleavages of the late early-modern Ottoman Empire as a tension between secular and religious law not only distorts the historical reality through our modern perspective, but also reifies the complex relationship of law and society. Although legislation was a professional activity shared among jurists and political authority, jurisdiction was based on the much more diverse and shared participation among diverse social groups, especially in the eighteenth century. In that sense, the conceptions of order and justice in society were widely negotiated rather than being limited to political tensions between the political authority and the jurists. After the sixteenth century, law, as the common property of various social groups, became the arena in which social and moral order was contested.

Moral order has always been central to discussions in times of crisis. Ottoman political thought on law, developed through the idea of a "circle of justice" and a repertoire of advice literature in the early-modern era, was established on a notion of justice. While this justice and moral order were connected first, in the earlier centuries, to the personal virtues of the sultan himself, later, during the seventeenth and eighteenth centuries, it was based on the proper functioning of the mechanisms of law and state institutions. Furthermore, the *kanun* was the discourse through which social policies on establishing ideal moral order were formulated in the form of law books.

In that moral order, men, be they the sultan or the grand vizier or the ordinary male guardian of a household, were responsible for putting things in their "proper place." The protection of women and girls from attacks and assaults of "bandits" in the provinces and the sumptuary laws in urban centers like Istanbul were all part of the moral discourse against the transgression of the borders, i.e., the borders between the legitimate power of the state and the illegitimate power of the "bandits," between the military and the *reaya*, between women and men, and finally between Muslims and non-Muslims.

Zilfi thoroughly argues that regulations over women that were systematized, especially in the late eighteenth and early nineteenth century, served "the purpose of reaffirming male Muslim solidarity in the face of growing economic stratification and cultural divisiveness." In that sense, "as the behavior of women and the minorities was denounced, it was Muslim males of all social ranks and orders who were being particularly addressed, identified, and morally constituted."[156] In this regard, imperial decrees of sumptuary regulations or the punishments imposed and scrutinized by the central government, such as confining sexual offenders in a fortress, were all moral regulations that the central government took responsibility for through the practice of the *kanun*, as I explain in the rest of the book.

In the first half of the eighteenth century the imperial government should have been more attentive to demands from the provinces during the ongoing wars and in periods of social unrest. While the hereditary dynasties of viziers and *ulema* were established in the provinces after the institution of lifelong tax-farming, those local notables who were denounced as "bandits" threatened the honor of the imperial government. In such a political atmosphere with multiple centers of power, the central government was wary of threatening both provincial and religious dynasties by freezing economic, social, and administrative terms through codified regulations. While standardization through codification was a desirable and manageable objective in the sixteenth century, as the eighteenth century approached it was neither desirable nor manageable for the Ottoman power. The promulgation of *kanunname*s was critical in terms of legitimizing imperial power while the political and economic interests of the central administration and the ruling elite often overlapped in the empire-consolidation process of the sixteenth century. Yet, the *kanun,* operationalized through highly bureaucratized institutions and sophisticated archiving practices in the eighteenth century, compelled the central elite to constantly redefine and reformulate its relationship with the provincial powers through new constitutional arrangements in the later periods. In the next chapter I demonstrate how petitioning became an important juncture in which the *kanun* was institutionalized in the central government's struggle and alliances with the provincial elite in the eighteenth century.

156 Zilfi, *Women and Slavery*, 94.

CHAPTER 2

Petitioning and Intervention: A Question of Power

> …But does the historian then merely substitute his form of objective prose—another administered story—for that of the protocollant? To the contrary, such a question implies a naive relativism. The historian's task is to offer a fuller range of moral standpoints rather than a closed, one-dimensional account of his own.[1]

In October 1742, the judge of Homa, a district of Denizli in Anatolia, sent a letter to the Imperial Council in Istanbul at the wish of the plaintiffs and the residents of a district that had been involved in and witnessed a trial for rape in their local court.[2] According to the letter, the father of a young man named Mehmed came to the court and said that a girl named Emine, who was a minor, was married to his son. However, before she reached puberty (and the marriage to his son Mehmed was consummated), she was abducted by a man and his brother and son from the same district, and raped by them. The men were interrogated by the court and claimed that Emine was not a virgin when she was raped, but Emine wanted the judge to notify (the Imperial Council) that the men had violated her virginity. The district residents confirmed her testimony and the wrongdoings of the aforementioned men and they also requested an official notification (be sent to the Imperial Council). Therefore, the judge sent a letter to the Imperial Council reporting the case and the Imperial Council wrote a decree back to the judge and commissioned him to resolve the case according to the *shari'a*.[3]

The case described above embodies many of the questions this study engages with. Why did Ottoman subjects send petitions or have their cases sent to the imperial center, as in the above example, when the legal system was, in fact, based on the local *kadı* courts? Why would a private/personal case concerning

1 David Warren Sabean, "Peasant Voices and Bureaucratic Texts: Narrative Structure in Early Modern German Protocols," in *Little Tools of Knowledge: Historical Essays on Academic and Bureaucratic Practices*, ed. Peter Becker and William Clark (Ann Arbor, MI: University of Michigan Press, 2001), 89–90.

2 BOA, Anadolu Ahkam Defteri 1, case 399 (Şaban 1155/October 1742).

3 This case is analyzed in more detail in later in the chapter.

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an ordinary crime or sexual offense from a distant province of Anatolia be heard at the imperial center and why would an imperial decree be written in response to it? Why did the Imperial Council create separate registers to record imperial responses to these types of petitions (from which this example was found)? What were the motives and intentions of the petitioners who brought their cases to the attention of the Imperial Council in Istanbul? Finally, what does it imply, in terms of gender order in eighteenth-century Anatolia, that ordinary people sought justice for victims of sexual violence through the imperial government?

The proliferation and diversification of the petitionary registers of the Imperial Council in the mid-eighteenth century, which I explain in the current chapter, was not merely a bureaucratic development. In this study I argue that the registers were designed to enable the central Ottoman government to surveil public order and the legal system in the socially and economically fragmented eighteenth-century empire. The current and following chapters investigate the phenomenon of this "centripetal"[4] legal structure in which Ottoman subjects sent petitions to the Imperial Council. I argue that the central government's interest in controlling, through petitions, local power holders, including its own state/military officials (*ehl-i örf*) and local notables, who were in times categorized or criminalized as "bandits," allowed Ottoman subjects, in turn, to employ strategies to maneuver within existing local power structures and to use one power cluster against another in their struggles. Thus, this chapter explores the ways in which Ottoman subjects maneuvered and engaged in social and political power struggles in their locality through a variety of legal means, i.e., through litigation in local courts and by petitioning the councils.

By focusing on the petitioning process (through a careful analysis of petitions submitted by Ottoman subjects to the Imperial Council in 1742–45), and the imperial rescripts written in response (along with an analysis of some local court cases), I explore the various legal means Ottoman subjects used to negotiate within existing norms and institutions. I discuss the potentials and limits, not only of the petitioners as subjects in the petitioning process, but also the position of the semi-official and official actors, such as petition writers, the chief mufti (*şeyhülislam*), local *kadı*s, and governors, all of whom were equally important in the formation of a petition. In this sense, I argue that petitioning was a collaborative and dialogic process in which Ottoman subjects and the state developed rhetorical strategies in the boundaries of a

4 Salzmann, "An *Ancien Régime* Revisited."

given official language in order to maneuver within existing power struggles. The utilization of certain socially loaded terms such as bandits (*eşkıya*) and administrative officials (*ehl-i örf*) and/or legal phrases such as "constant habit" (*adet-i müstemirre*) and "violation of honor" (*hetk-i ırz*) enabled both sides to claim justice and honor and redefine the terms of the relationship between state and subject.

The utilization of the terms associated with "banditry," both in petitions and imperial decrees, as demonstrated in the following chapter, constitutes an illuminating example of how the petitionary process created its own communication tools in a dialogic process between state and subject. Even more illuminating is the fact that in this discursive field sexual violence was one of the most important indicators that the accused was habituated to "violence," namely he was a bandit. In this regard, sexual violence was an important symbol of excessive "violence," tantamount to transgressing the gender order as well as the order and rules of the imperial government. Here, the notion of "honor" and the question of whose honor was destroyed in a sexual assault arise. The petitionary process opens an avenue for us to understand the close connection between notions of sexuality, violence, honor, disorder, and governance in eighteenth-century Ottoman society. Yet, we must first understand how petitioning worked in the eighteenth-century Ottoman context and in what circumstances people applied to the Imperial Council; this is the concern of the current chapter.

The Imperial Council and Petitions as a Reflection of Imperial Law in Legal Practice

The oligarchic rule which overcame the absolute power of the sultan, explained in Chapter 1, was also evident in the new structure of the Imperial Council. The transformations in the Imperial Council can be considered important indicators of the shifts in power balances in the central administration because the Imperial Council was the "parliament" of the early-modern state, in the sense that all important decisions concerning governance and administration were made and implemented via imperial decrees and statutes through this institution. In this sense, understanding the structure of the Imperial Council in this economically and socially reconstructed empire is also crucial to grasping the new political configurations and the status of imperial law in the eighteenth century.

While Ottoman sultans before Mehmed II (r. 1451–81) personally convened and led the Imperial Council, Mehmed II, who gave the Divan-ı Hümayun

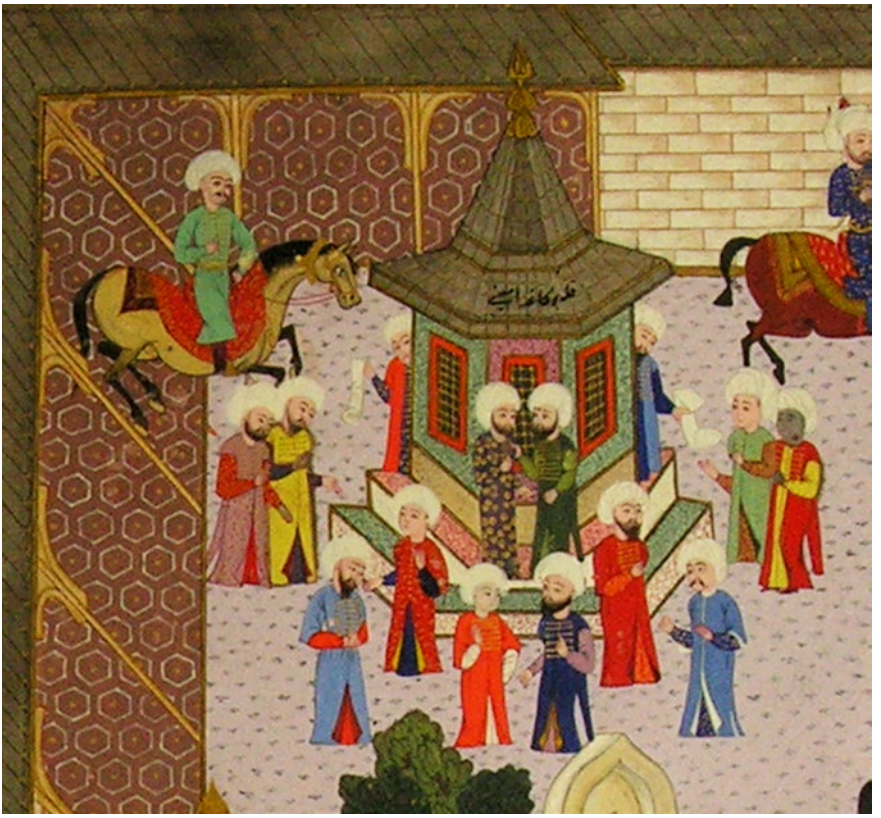

FIGURE 2.1 *Petitioning of Ottoman subjects at the Clerk's Tower (Deavi Kasrı) in the First Courtyard of the Topkapı Palace, by Molla Tiflisi (c. 1584).* Hünernâme*, Seyyid Lokman.* TOPKAPI PALACE MUSEUM LIBRARY, H 1523, FOLIO 15B.

its "classic" name and institutionalized it through his law book, ended the procedure of holding daily meetings of the *divan* and transferred this authority to the grand vizier.[5] Despite the fact that it was still obligatory for the "government" to report and obtain the sultan's approval for decisions taken in the Imperial Council on certain designated days (*arz günü*), this development itself can be considered the beginning of the transfer of legislative and judiciary authority from the sultan to the grand vizier. The transfer of authority was also evident in the fact that the Divan-ı Hümayun in the Topkapı Palace gradually

5 Uzunçarşılı, *Osmanlı Devletinin Merkez ve Bahriye Teşkilatı*, 2–3; Recep Ahıshalı, "The Institution of the Imperial Council (Divan-ı Hümayun)," in *The Great Ottoman and Turkish Civilization*, ed. Kemal Çiçek (Ankara: Yeni Türkiye, 2000), 506.

lost its function as a "parliament." In the sixteenth century its meetings were first reduced to four days a week, then in the mid-seventeenth century, to two days a week. While at the beginning of the eighteenth century it used to meet, though only once a week, over the course of the rest of the century it was totally discontinued or at best it met only occasionally for the distribution of the salaries of the janissaries or the reception of foreign envoys.[6]

So what other body took over its functions as the "parliament"? Which institution do we refer to when we talk about the Divan (Council) in the eighteenth century? With the increasing importance of the grand vizier and the chancellor (*reisülküttab*) in the bureaucratic organization of the imperial power, a permanent council (*divan*) was appointed to the grand vizierate in 1654.[7] The transfer of the entire department of the chancellor from the old Divan-ı Hümayun to the grand vizier's residence was also an important step in turning the grand vizier's council into an Istanbul "government" with its own bureaucracy. Previously, the grand vizier's council was only a derivative council called İkindi Divanı ("afternoon council") which was only held after regular Divan-ı Hümayun meetings to discuss less "important issues" left out of the latter.[8] However, by the mid-seventeenth century, the grand vizier's council had become separate and permanent. While it had been called the "vizier's palace" (Saray-ı Asafi) or the Sublime Porte (Bâbı Asafi, Porte of the vizier), in the eighteenth century it became known as the "council of the pasha's gate" (Paşakapısı Divanı).[9] The emphasis on its character as an "assembly" is noteworthy in relation to the gradual transformation of the grand vizier's government and the point it reached in the eighteenth century.

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6 d'Ohsson states that Sultan Ahmed III held the *divan* only once a week on Tuesdays and his successors held it even more rarely. Ignatius Mouradgea d'Ohsson, *Tableau général de l'Empire othoman*, vol. 7 (Paris: Firmin Didot Père et Fils, 1824), 213.

7 Sultan Mehmed IV (r. 1648–1687) renovated the Halil Pasha Palace and gave it to his grand vizier, Dervish Mehmed Pasha, as a permanent council hall and residence. Hümeyra Şahin, "Babıali'de Uygulanan Teşrifat (1703–1839)" (MA thesis, Marmara Üniversitesi, 2001), 2.

8 Since there are no separate registers of the grand vizier's council except the *Mühimme* registers of the Divan-ı Hümayun, it is not possible to know anything about the division of labor between these two councils. Ahmet Mumcu's seminal work on the Divan-ı Hümayun also confirms that it is difficult to determine which issues were "important" and which were not, since there is evidence that both *divan*s discussed very mundane issues from time to time. Mumcu, *Hukuksal ve Siyasal*, 143. This also substantiates the increasing authority of the grand vizier, given that he led the Divan-ı Hümayun meetings from the mid-fifteenth century onward, and that he had the authority to decide which cases would be held in his own *divan*.

9 Ahıshalı, "The Institution of the Imperial Council," 507; Uzunçarşılı, *Osmanlı Devletinin Merkez ve Bahriye Teşkilatı*, 140.

Given the fact that the Divan-ı Hümayun meetings were discontinued or held only occasionally, it is clear that if someone wanted their petition heard, and judicial, legislative, and executive decisions applied, the only recourse was to apply to the grand vizier's council(s). Hence, when we talk of the Imperial Council in the eighteenth century, we are, in fact, referring to the multiple councils the grand vizier held in his own palace/porte, i.e., in his *divan*. We can trace the ongoing status of the councils of the grand vizier in the eighteenth century in the accounts of Demetrius Cantemir, Prince of Moldavia, who lived in Istanbul for several decades,[10] and wrote his history of the Ottoman Empire at the beginning of the eighteenth century:

> Now the form of judicial proceedings among the Turks is in this manner. Four times every week, namely on Fridays, Saturdays, Mondays and Wednesdays, the Vizir is obliged to appear in the *Divan*, and administer justice to the people, unless he be hindered by very important affairs, which seldom happens. But if he is hindered, the Chaush Bashi [*çavuşbaşı*, the chief guardian] supplies his place. Sundays and Tuesdays are set apart for the Sultan's *Divan*, or Galibe *Divan*. Thursdays are days of rest, from whence they are called datil Giuni. The Vizir has four assistants, on Fridays both the Kaziulaskiers, the Anatolian on his left hand, and the Rumelian on his right; the former fitting only as hearer, and the latter as judge; on Saturdays, Galata Mollasi, or the judge of Pera, on Mondays, Eiub Mollasi and Iskiuder Efendisi.[11]

This depiction of the grand vizier's councils was not in fact different from classic depictions of the Divan-ı Hümayun in the Topkapı Palace, the only exception being that the head of the government was the grand vizier and that the

10 Dimitrie Cantemir (1673–1723) was Prince of Moldavia (in March-April 1693 and in 1710–11). He was also a historian, linguist, and composer. Between 1687 and 1710 he lived in forced exile in Istanbul where he learned Turkish and studied the history of the Ottoman Empire. He joined Peter the Great in his campaign against the Ottomans when he was the Prince of Moldavia in 1710–11. His best-known work is the *History of the Growth and Decay of the Ottoman Empire* which circulated throughout Europe in manuscript form, and was printed in 1734 in London. It was also translated and printed in Germany and France. It remained one of the seminal works on the Ottoman Empire up to the middle of the nineteenth century—notably, it was used as a reference by Edward Gibbon for his *The History of the Decline and Fall of the Roman Empire*.

11 Dimitrie Cantemir, *The History of the Growth and Decay of the Othman Empire*, trans. N. Tindal (London: J.J., and P. Knapton, 1734), 352.

center of government was his palace.[12] The *divan* of the grand vizier met at least four times a week in the eighteenth century as the Divan-ı Hümayun had done in the sixteenth century. The grand vizier held court and heard cases with the assistance of judicial authorities, military judges or, on certain days, the judges of Istanbul.[13] The Friday *divan* of the grand vizier appears to most resemble the Divan-ı Hümayun of the Topkapı Palace. It was dedicated to hearing cases and listening to grievances from Ottoman subjects. The structure of the procedure in which he listened to petitions, and the composition of its judicial members resembled the old Divan-ı Hümayun, as described in Tevkiʿî Abdurrahman Pasha's compilation of legal codes in the second half of the seventeenth century.[14] Another separate council was designated to listen to petitions and hear cases, but only those of Istanbulites. In this *divan*, the grand vizier was assisted by the judges of Istanbul, Galata, Eyüp, and Üsküdar, instead of the two *kadıasker*s.[15] (See Figure 2.2)

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12 Ahıshalı, "The Institution of the Imperial Council," 506–514.

13 It should be noted that there is no consensus among scholars on the judicial duties and authorities of these *kadıasker*s. While previous studies argued that *kadıasker*s had judiciary authority in the *divan* (Mehmet İpşirli, "Osmanlı Devleti'nde Kazaskerlik (XVII. Yüzyıla Kadar)," *Belleten* (1997)), recent studies claim that only the Thracian *kadıasker* had independent judicial authority and the Anatolian *kadıasker* only served as a judiciary power when he was appointed by the grand vizier to certain cases, especially military cases. (Mustafa Şentop, *Osmanlı Yargı Sistemi ve Kazaskerlik* (Istanbul: Klasik, 2005), 176; Mehmet Akman, *Osmanlı Devleti'nde Ceza Yargılaması* (Istanbul: Eren, 2004), 40.) It is also explained as such in Tevkiʿî Abdurrahman Pasha, "Tevkiʿî Abdurrahman Paşa," 508.

14 The law book compilation of Tevkiʿî Abdurrahman Pasha differed from general law books and those attributed to a certain province (*liva kanunnameleri*) or to specific groups of Ottoman subjects that mostly contained sultanic laws on taxation, administration, and criminal law. This law book was a semi-private compilation covering predominantly laws concerning state organization and the workings of the Ottoman government and the palace. In this law book, the procedure of hearing cases was explained under *Kanun-ı Divan-ı Cuma* as follows: "Tezkireciler erbab-ı masalihin arz-ı hallerini nöbetle okuyub vezir-i azam hazretleri istima ve şerʿ ve kanun üzere fasl-ı husumat ve katʿ-ı nizaʿ buyururlar. İktiza iderse bazı davaları Rumeli kadıaskerine havale ederler. Ve kesret-i daʿavi vaki olursa Anadolu kadıaskeri dahi vezir-i azam hazretlerinin fermanlarıyla dava dinlemek caiz olur." Tevkiʿî Abdurrahman Pasha, "Tevkiʿî Abdurrahman Paşa."

15 Although Cantemir (*The History of the Growth and Decay*, 352.) mentioned two councils (one on Saturday and the other on Monday) dealing with the cases of Istanbulites, contemporary traveler accounts and law books from the seventeenth and eighteenth centuries as well as recent research show that the Wednesday *divan* was specifically designated to hear the petitions of the Istanbulites under the jurisdiction of Istanbul judges. For contemporary accounts, see G.A. Olivier, *Voyage dans l'empire Othoman, l'Egypte et la Perse: fait par ordre du gouvernement, pendant les six premières années de la republique*, 6 vols. (Paris: Chez H. Agasse, 1801), 18., as quoted in Uzunçarşılı, *Osmanlı Devletinin Merkez ve*

FIGURE 2.2 *Women appealing to the gatekeeper at the grand vizier's palace* (*İbrahim Paşa Palace*). Hünernâme, *Seyyid Lokman.*
TOPKAPI PALACE MUSEUM LIBRARY, H 1524, FOLIO 250A.

Thus, the development and evolution of the grand vizier's councils throughout the seventeenth and eighteenth centuries clearly demonstrate that there was an increase in the administrative authority of the grand vizier throughout the empire. Such a transformation in the functions of the grand vizier's council(s) signified greater transformations in the economic, administrative, and bureaucratic re-configuration of power in the Ottoman Empire. The shift that occurred in the legitimacy mechanisms of Ottoman power from "the sultan's charismatic leadership to the collective rule of the nobility"[16] brought about a bureaucratic restructuring within the Imperial Council that embodied the "government" at the imperial center.

This shift did not necessarily mean the disadvantage of imperial discretion in the legal sphere. The most important sources, those which present us with a clear picture of the application of imperial law in eighteenth-century legal practice, are petitions and imperial decrees written in response to petitions to the Imperial Council.[17] Petitions sent and brought before the Imperial Council provide us with very interesting information about both official and popular knowledge of the *kanun* in the mid-eighteenth century. A detailed analysis of a folder arbitrarily selected from thousands of mid-eighteenth-century petition folders from the Ottoman Archives in Istanbul demonstrates that there was an ongoing process of identifying and categorizing social problems within a certain legal milieu in which the *kanun* was a legitimate source of Islamic legal practice.[18] These petitions and the imperial rescripts written on them refer to both the *kanun* and the *shari'a* as active sources of legal solutions according to which particular grievances were handled.

Bahriye Teşkilatı, 140; Tevki'î Abdurrahman Pasha, "Tevki'î Abdurrahman Paşa," 507; for a recent study, see Tamdoğan, "Sulh and the 18th Century Ottoman Courts of Üsküdar and Adana." Also see Chapter 5 for a detailed discussion of the peculiarities of the relationship (between the Istanbul courts and the Imperial Council) that resulted from the special *divan* designated for the Istanbulites.

16 Artan, "From Charismatic Leadership to Collective Rule."

17 Since I deal with judges and their decisions in the local courts in the following chapters, I do not incorporate them into my analysis here. Furthermore, the documentation of the Imperial Council as *the* institution through which the politico-administrative jurisdiction of the Ottoman central power was articulated enables us to gain a closer look at the use of the *kanun*.

18 This phenomenon stands in stark contrast to the argument about the *kanun* being discarded by legal authorities from the seventeenth century onwards, as explained in Chapter 1.

The petition folder which I selected for this purpose belongs to 1157/1744[19] and is composed of one hundred forty-four petitions sent or brought to the Imperial Council from throughout the empire.[20] Of the total number of petitions, thirty-one explicitly refer to the *kanun* in various ways, if we take *kanun* in its literal sense. Among them, there are petitions in which petitioners[21] either directly request an imperial decree according to the *kanun* ("an imperial order according to *kanun* is kindly requested [from the Imperial Council]")[22] or complain about certain people who acted against the *kanun*, *defter* (register), and *ʿörf* (custom) ("in order to prevent his/her interference [in my affairs] contrary to *kanun* and *ʿörf*").[23] Although the latter usage can be read as a formulaic or

19 BOA, A.DVN.ŞKT, folder 67. The specific dates of each petition are not indicated. The only information we have is the year, which is indicated for the entire folder. It is not clear, at least to me, how the Prime Minister Archives categorized these petitions; information on dates within the text is rarely revealed.

20 Petition folders (A.DVN.ŞKT) in the Prime Minister Archives (BOA) start abruptly in the year 1742 (1155); there are 977 folders in 1742–67 (1155–80), each of which comprises more than 100 petitions. There are of course petitions from earlier centuries but they are far fewer in number and scattered in multiple folders with no systematic logic. It is almost impossible to judge whether the Ottoman bureaucracy did not collect and preserve petitions regularly or whether modern thinking on archiving neglected the issue of categorization and did not catalogue them in a systematic order for the periods before the mid-eighteenth century. According to my conversations with the archive staff, the petition folders were catalogued according to the classification of available registers of the Imperial Council. However, this does not explain why we do not have petition folders for the seventeenth century, for which time petition registers (*Şikayet Defterleri*) were already established. Interestingly enough, petitions from 1742 onwards were catalogued in separate folders, the dates of which correspond to the appearance of provincial registers of imperial rescripts (*Vilayet Ahkam Defterleri*). The fact that both the petition folders and the provincial registers of imperial rescripts have the same starting date signifies an important shift in bureaucratic and administrative mentality, perhaps one that parallels the central government's increasing concern to moniter local notables in the provinces.

21 The question of who wrote these petitions or what kind of strategies and language they used in formalizing their petitions is discussed later in this chapter.

22 Petitioners generally used formulas like "kanun üzere hükm-i şerif rica olunur" (BOA, A.DVN.ŞKT, folder 67, petitions 20 and 78), "kanun üzere emr-i şerif ihsan buyurulmak küllî rica ve niyaz olunur" (BOA, A.DVN.ŞKT, folder 67, petition 27) and "kanun ve defter mucibince ahz ü kabz murad…" (BOA, A.DVN.ŞKT, folder 67, petition 49).

23 Examples of such usages include: "hilaf-ı kanun ve mugayir-i ʿörf zahir olan müdahalesi men ve defʿ olunmak babında" (BOA, A.DVN.ŞKT, folder 67, petition 65); "hilaf-ı şerʿ-i şerif ve mugayir-i fetva-yı şerif ve kanun" (BOA, A.DVN.ŞKT, folder 67, petition 121); "hilaf-ı kanun ve defter gadr…" (BOA, A.DVN.ŞKT, folder 67, petition 64) and "kanundan ziyade akçelerimizi alıp…" (BOA, A.DVN.ŞKT, folder 67, petition 25).

rhetorical one, the presence of the *kanun* and *'örf* in popular legal usage still reflects the widespread usage of the *kanun* in the legal discourse in the mid-eighteenth century.

However, the *kanun* was not merely a legal figment of petitioners, leftover from previous centuries. The imperial decree summaries (*buyuruldu*)[24] written at the top of these petitions confirm that the *kanun* was still referred to as an actual legal force in the mid-eighteenth century. These imperial decrees written at the top of the petitions immediately during or after the Imperial Council meetings[25] explicitly state that the order had been given "according to *kanun*" ("it has been ordered according to *kanun;*" "it has been ordered to hear [the case] according to *kanun*") or "according to *shari'a*" ("it has been ordered according to *şer'*") or sometimes both.[26] It is evident from these expressions that the Imperial Council staff had a very clear-cut understanding of what should be resolved according to which law in the legal practice.[27]

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24 A *buyuruldu* is an order by an Ottoman grand vizier, vizier, provincial governor or other high official to a subordinate. The term is derived from the word *buyuruldi*, "it has been ordered," as the order usually ends with this phrase and thus it gradually developed into a convention. *Buyuruldu*s are of two main types: (a) decisions written in the margin of an incoming petition or report, often ordering that a *ferman* (imperial decree) be issued to a certain effect; (b) orders issued independently. Uriel Heyd, "Buyuruldu," in *Encyclopaedia of Islam, Second Edition*, ed. P. Bearman, et al. (Brill Online, 2009). The *buyuruldu*s discussed here are of the first type.

25 The petitions analyzed in this folder and others were collected by the grand vizier's council (Bâb-ı Asafi) and the majority of them have *buyuruldu*s with the chancellor's (*reisülküttab*) signature. This indicates that the chancellor gave the imperial orders—at least at the initial stage of the petitioning process—on behalf of the grand vizier.

26 The formulas used in these decrees were as follows: For *kanun*; "kanun üzere hüküm buyuruldu" (BOA, A.DVN.ŞKT, folder 67, petitions 4, 27, 39, 48, 49, 64, 65, 67, and 78), "kanun üzere iskan olunmak buyuruldu" (BOA, A.DVN.ŞKT, folder 67, petitions 11, 28, 37, and 70), "kanun üzere murafaası için buyuruldu" (BOA, A.DVN.ŞKT, folder 67, petition 25), "mahallinde kanun üzere hüküm buyuruldu" (BOA, A.DVN.ŞKT, folder 67, petition 126). For *shari'a*, "şerle hüküm buyuruldu" (BOA, A.DVN.ŞKT, folder 67, petitions 5, 10, 19, 20, 31, and many more) "mahallinde şerle hüküm buyuruldu" (BOA, A.DVN.ŞKT, folder 67, petitions 23 and 14), "bulunduğu mahalde şerle hüküm buyuruldu" (BOA, A.DVN.ŞKT, folder 67, petition 123). For both, "şer ve kanun üzere hüküm buyuruldu" (BOA, A.DVN.ŞKT, folder 67, petition 136).

27 Unfortunately, researchers do not have such crystal-clear perceptions. First, she cannot see the details of the decisions in these summary decrees. The imperial decrees (*fermans*) were written after this initial register of the *buyuruldu* on the petitions themselves, and then copies were sent to the governor and/or the *kadı* who would adjudicate or execute the case, and relatively longer summaries were registered in the relevant register of the Imperial Council, such as the *Ahkam* or *Mühimme* registers. Second, in the archives,

We can gain a better understanding of these dynamics by analyzing the subject matter of the petitions and the imperial decrees that refer to the *kanun*. Most cases were in fact within the scope of the main interests of previous law books and "rescripts of justice" of the sixteenth century, i.e., administrative, fiscal, and criminal matters such as oppression (*zulm ve taʿaddi*) and corruption due to overtaxation,[28] "unlawful" seizure of or interference with taxpaying subjects' lands and crops,[29] problems with tax farmers and fief-holders over the settlement and transfer of certain groups in designated lands or the way in which revenue was collected,[30] and differences of opinion over *timar* holdings or tax-farming rights.[31] In criminal cases, there was a concentration on the matter of malpractice by local power holders. Whenever there was an extralegal execution of certain people or restraint on the part of provincial administrative officials in inflicting a previously-decreed penalty, there is an explicit reference to the *kanun* either in the petition or in the imperial decree, as we see in more detail in the following pages.[32]

With regard to quantitative facts such as determining the borders of a piece of land or the amount of revenue to be received, tax-farming or *timar* rights over a piece of land, it seems that the Ottoman bureaucracy did not change its traditional practice of "checking the registers."[33] In the eighteenth century, and earlier, all transactions processed through petitions in different offices of the Imperial Council were recorded for all practical purposes on the petition itself rather than being bundled together in a folder. It is therefore possible to see, on some of the petitions concerning financial disputes, which offices a petition

petitions from the eighteenth century are isolated from the other legal documents of the same case—like the *hüccet*s received from the *kadı*s, the *fetva*s received from the *şeyhülislam*, if any, or the imperial decrees themselves, which were written in response to particular petitions. For nineteenth-century cases the researcher has access to almost all the documentation of a single case collected in a folder, which enables her to follow the entire legal procedure both chronologically and spatially. Third, Ottoman scholars are still far from understanding the internal decision-making mechanisms and division of labor in the Imperial Council.

28 BOA, A.DVN.ŞKT, folder 67, petitions 7 and 90.

29 BOA, A.DVN.ŞKT, folder 67, petitions 20, 39, 78, and 89.

30 BOA, A.DVN.ŞKT, folder 67, petitions 28, 37, 70, and 94.

31 BOA, A.DVN.ŞKT, folder 67, petitions 48, 49, 65, and 121.

32 For example, BOA, A.DVN.ŞKT folder 67, petitions 4, 7, 20, 27, 39, 64, and 109.

33 Salzmann's work on eighteenth-century Amid reveals that officials still respected and applied to the cadastral maps to affirm the rights of new tax farmers into the old system of land. In that sense, she argues, the tax farmer, as a relative newcomer, was an unwitting surveyor for Istanbul, from which it could update its registers. Salzmann, *Tocqueville in the Ottoman Empire*, 143–144.

traveled through within the Imperial Council. On these petitions, copies of the relevant sections of the registers were entered on the petition to check the accuracy of information given in the petition or to establish which imperial orders were given previously to resolve the specific financial issue. Therefore, at least for certain financial cases, it is possible to trace which registers were referred to in process of resolving the issue according to the *kanun*.

However, for most cases in which the imperial decree ordered the case to be handled "according to *kanun*," nothing was specified. No specific reference was given as to which register or office/personnel (of the Imperial Council or of the provincial courts and councils) should handle the case. In such cases the sources of *kanun* are unknown to the researcher. Yet it is possible that the classification of petitions according to the *kanun* and the *shariʿa* might have been the factor that determined which personnel/office of the Imperial Council took care of the case. With the further specialization of offices in the Imperial Council that took place after the empowerment of the grand vizier's council (Bâb-ı Asafi) in the second half of the seventeenth century, various sorts of petitions were distributed among these offices according to subject matter. In the eighteenth century, Imperial Council personnel handled a petition throughout all its different stages.[34]

The short notes written on the back pages of the petitions are interesting indicators that show that the *kanun* was a living and tangible legal force rather than a rhetorical reference. These short notes were summaries categorizing the petitioners' requests and consequently the imperial decree according to the *shariʿa* or *kanun*. They were generally short and simple notes such as "a request for an order according to *kanun*" or "a pleading for an order according to *şerʿ*." Some were more detailed, indicating the content of the petition, such as "an order has been required according to *şerʿ* in accordance with the court document she had."[35] And sometimes they did not specifically designate a legal entity to solve the case but only summarized the request of the petition, as in the following example: "A request has been made to prevent her transgressions contrary to *şerʿ*."[36] Thus, these small notes seem to summarize the petitioner's request in legal terms, even though the petitioner did not formulate it

34 For more insight on the handling of the petitions by the Imperial Council personnel and a detailed anaylsis of a sample petition, see Baldwin, "Petitioning the Sultan in Ottoman Egypt," 503–511.

35 "hüccet-i şeriyesi mucibince şerle hüküm rica olunur." BOA, A.DVN.ŞKT, folder 67, petition 79.

36 "hilaf-ı şer-i şerif teʿaddisi men ve defʿ olunmak rica olunur." BOA, A.DVN.ŞKT, folder 67, petition 112.

in this way. Yet explicit references made to the *kanun* and *shari'a* separately or together reveal an awareness of, and a clear perception of the domain of imperial law that functioned in tandem with Islamic jurisprudence on the part of both Imperial Council personnel and petition writers in eighteenth-century Ottoman Anatolia.

These short notes, in verso, that summarized the requests and the legal proceedings were apparently an attempt to classify petitions in the Imperial Council. It seems that they were taken by Imperial Council personnel who collected written petitions in the *divan* and provided these notes so that they could be handled more efficiently in the various offices of the Imperial Council. In the eighteenth century, Imperial Council personnel handled the petitions during all its stages. Even the final imperial decree (*buyuruldu*) was written and certified by the chancellor (*reisülküttab*) prior to or without the grand vizier's seeing it.[37] Bearing in mind that not all the petitions contained these short notes, it is also probable that those petitions which were sent through agents and therefore were not heard in the Imperial Council in the immediate presence of the petitioner were classified "according to *shari'a*" or "according to *kanun*" by the chief guardian (*çavuşbaşı*) and his secretaries (*tezkireci*s) in order to make their processing easier and faster.[38] No matter which petitions were classified

37 Recep Ahıshalı, *Osmanlı Devlet Teşkilatında Reisülküttablık, XVIII. Yüzyıl* (Istanbul: Tarih ve Tabiat Yayınları, 2001), 82–87. By the eighteenth century, the Imperial Council was already divided into specialized departments, each with its own personnel. There were four main departments, which worked in coordination with each other, all under the office of *reisülküttab*. The first and most important of them was the department (*kalem*) of *beylikçi* or *divan*, which was responsible for keeping records of imperial decrees of all sorts, maintaining the register series, handling petitions and cases submitted to the Imperial Council, and coordinating the transactions processed by the Imperial Council. The other three were the *tahvil kalemi* which kept registers of the appointments of *zeamet* and *timar*; *ruus kalemi*, which dealt with the appointment of state officials, including religious personnel; and *amedi kalemi*, which handled more "private" correspondence between the grand vizier and the sultan, and the *reisülküttāb* and the grand vizier, and documents sent to the foreign governments. İpşirli, "The Central Administration," 176–182. For a more detailed analysis of each department and its personnel, see Ahıshalı, *Osmanlı Devlet Teşkilatında Reisülküttablık*, 74–172. According to this categorization, the majority of petitions sent by Ottoman subjects were handled in the *beylikçi/divan* department. All the petitions I analyze here were catalogued under *Beylikçi/Divan Kalemi* in A.DVN.ŞKT (*Şikayet Kalemi Belgeleri*). I did not complete my examination of the folders of the other three departments of the Imperial Council, which may or may not include some petitions concerning land and financial issues.

38 Murat Uluskan, who worked on the office of the chief guardian (*çavuşbaşı*) in the Imperial Council, argues that the authority of the *çavuşbaşı* and his assistants, the first and

by whom, it is clear that these classifications were made in accordance with a clear-cut perception of the *kanun* and *shari'a*, a perception that seems to have been in existence in the Imperial Council's legal vocabulary and practice for a long time.

In terms of legal bureaucracy and procedure and as certain puzzling aspects of the *kanun* demonstrate, the *kanun* did not have just one meaning, at least in eighteenth-century legal culture. When documents referred to the *kanun* (and *shari'a* as well), it might have meant a different thing each time; either applying to a register or sending the case to a specific office or employee in the legal bureaucracy of the Imperial Council. It sometimes meant that the case was to be adjudicated and executed according to *kanun* principles because of the criminal character of the matter or the involvement of a state official in the criminal or administrative issue that the petition raised.[39]

Petitionary (*Ahkam*) Registers and Socio-legal Surveillance

The previous section discussed the administrative shift from sultanic legal authority to the "government" of the grand vizier that took place with the transfer

second *tezkireci*s, increased with the transfer of *divan* meetings to the grand vizier's porte. He explains that the chief guardian, through the assistance of *tezkireci*s, provided the grand vizier with summaries of cases to be held in the Imperial Council. They even had the authority to refer some cases to the relevant courts by putting the grand vizier's signature on them. Murat Uluskan, "Divan-ı Hümayun Çavuşları" (PhD diss., Marmara Üniversitesi, 2004), 112. Although he does not give specific information about the classification of petitions as I have described above, we expect that this task was done by the office of the chief guardian alongside other similar tasks mentioned in Uluskan's work.

39 Some of the worst criminal offenses came under the jurisdiction of the *kanun*. I discuss examples of such cases in more detail in the following chapters. Furthermore, state officials were also to be investigated and punished not by *shari'a* judges but by their superiors, according to the rules of politico-administrative jurisdiction. For example, in response to a community petition complaining of "the interference of the local governor (*voyvoda*) in the imprisonment of janissaries, who would normally be punished by their own military superior," an imperial order (*buyuruldu*) was written (according to the *kanun*) by the commander-in-chief of the janissaries in Istanbul, who stated that "the execution of the janissaries' penalty was in the hands of their superiors according to the *kanun* and therefore the interference of the administrative officers in their punishment was against the *kanun*." See BOA, Istanbul Ahkam Defteri 6, case 929 (year 1177/1763) in Ahmet Kal'a, *İstanbul Ahkam Defterleri: İstanbul'da Sosyal Hayat*, vol. 2 (Istanbul: İstanbul Araştırmaları Merkezi, 1998), 316–317. This is one example of the multiple ways the *kanun* was used in Ottoman legal practice in the eighteenth century.

of the bureaucratic and governmental center from the sultan's *divan* to the grand vizier's *divan*(s). This shift was part of larger bureaucratic developments in the central administration. Another important indicator of this structural bureaucratic change that started in the seventeenth century and gained momentum in the eighteenth century, can be seen, for example, in the *reisülküttab*'s (the head of chancellor) takeover of most of the previous responsibilities of the *nişancı* and the latter's transfer to the grand vizier's *divan*.

The bureaucratic momentum that culminated in the eighteenth century can also be observed in the record-keeping practices of the central administration.[40] Although the idea of seeking justice directly from the sultan had always existed in principle, the Imperial Council, which was responsible for collecting and hearing petitions from the fifteenth century onward, did not keep regular records of petitions. Thus, up until the seventeenth century, we can gain a sense of the contents of these petitions only from occasional encounters with actual petitions in hundreds of different folders or from more systematic recordings of imperial decrees, which were called *Mühimme* registers. The latter were written in response to the petitions of high level provincial governors and judges and concerned mainly administrative matters. Only in the second half of the seventeenth century did the central government start keeping records of imperial rescripts written in response to petitions from ordinary Ottoman subjects and low level administrators throughout the empire. These records form a special series called *Şikayet Defterleri* (petition registers).[41] More importantly, from 1742 onward, separate registers of such rescripts known as *Vilayet Ahkam Defterleri* (provincial registers of imperial rescripts) were set up for the most important provinces.[42]

We can visualize the gradual increase in bureaucracy and specialization in the form of records of the rescripts written in response to petitions by looking at the change in the numbers of registers over the years. While there are a total of approximately 70 *Mühimme* registers for the sixteenth century (from 1544

40 Suraiya Faroqhi notes that there is also a decrease in the documentation of the central state institutions between 1620 and 1720 compared to previous and later periods.

41 Suraiya Faroqhi, *Approaching Ottoman History: An Introduction to the Sources* (Cambridge and New York: Cambridge University Press, 1999), 51.

42 According to my conversation with Prof. Feridun Emecen and information in his recent article, the introduction of these new registers was initiated by Ragıp Efendi (Koca Ragıp Paşa), the *reisülküttab* of the time. See Feridun Emecen, "Osmanlı Divanının Ana Defter Serileri: Ahkam-ı Miri, Ahkam-ı Kuyud-ı Mühimme ve Ahkam-ı Şikayet," *Türkiye Araştırmaları Literatür Dergisi* 3, no. 5 (2005). I have also documented his name in the prologue of the first volume of Anadolu *Ahkam* registers.

onwards) and 60 for the seventeenth century,[43] there are approximately 200 petition (*Şikayet*) registers for the period from 1649 to 1837.[44] Yet, the number of provincial registers of imperial rescripts (*Vilayet Ahkam Defterleri*) reveals an exponential increase in these registers: There are a total of 542 registers for sixteen provinces for the period starting in 1742 and ending roughly in 1908,[45] with Anadolu (185 total and 123 for 1742–1800) and Rumeli (85 total and 53 for 1742–1800) having the greatest number and Maraş (6), Trabzon (8), Diyarbekir, Halep (9), and Şam-ı Şerif (9) having the fewest number of registers. When we consider that the majority of the provincial registers of imperial rescripts belong to the period before legal reforms of *Tanzimat* in the 1840s,[46] it is clear that the quantity of provincial registers for one hundred years (from its appearance in 1742 to 1842) doubled (or more) that of the petition registers for the previous period of almost two hundred years (1649–1837). This means, even though these calculations are rough, that petitionary registers quadrupled in the second half of the eighteenth century.

This shift in record keeping raises an important question: What does the gradual increase and diversification of "petitionary"[47] registers imply? Scattered archival documentation of the petitions themselves reveals that there

43 For a detailed discussion of the problematic categorization of these registers in the Ottoman archives and attempts by scholars to correct this, including the researcher herself, see Soyer, "XVII. yy. Osmanlı Divan," 1–7. For other works on *mühimme* registers, see Suraiya Faroqhi, "Mühimme Defterleri," in *Encyclopaedia of Islam, Second Edition*, ed. Th. Bianquis P. Bearman, C.E. Bosworth, E. van Donzel, W.P. Heinrichs (Brill Online, 2014); Mübahat S. Kütükoğlu, "Mühimme Defterlerindeki Muamele Kayıtları Üzerine," in *Tarih Boyunca Paleografya ve Diplomatik İlmi Semineri: 30 Nisan-2 Mayıs 1986, Bildiriler* (Istanbul: Edebiyat Fakültesi Basımevi, 1988); Emecen, "Osmanlı Divanının Ana Defter Serileri."

44 I have used an approximate number (not the exact number of 213 given as the number of *Şikayet* registers in the Ottoman Prime Ministry Archive catalogues), since researchers have found some registers mistakenly catalogued as *şikayet.* See Soyer, "XVII. yy. Osmanlı Divan," 78–88.

45 There are two other registers catalogued under *Mora Ahkam* registers that belong to the period before 1742. However, these registers (number 1 for the 1716–29 and number 2 for 1717–50) were already identified as not being typical *Ahkam* registers, in terms of their content in the Prime Ministry Archive Manual. For more information, see "Başbakanlık Osmanlı Arşivi Rehberi" (Istanbul: Başbakanlık Basımevi, 2010), 34.

46 For example, while the quantity of Anadolu *Ahkam* registers for a period of one hundred years between 1742 and 1842 is 174, there are only 11 registers for 1843–89. These proportions are similar for other provinces too.

47 I use the term "petitionary" for these registers because they do not contain "petitions" themselves, but imperial rescripts written in response to petitions and letters from Ottoman subjects and legal-administrative authorities.

was no systematic documentation of petitions in the Ottoman Archive, at least for the period we are concerned with here and before. There is also a methodological drawback to verifying the increase in petitions by looking at the petition and provincial registers because we may never know whether the central government kept records of all responses written to the petitions received.[48] As a result, we can only infer that there was a sudden increase in petitions and imperial rescripts and this reflects a shift in governmental policy; we cannot verify if there was a real increase in petitioning. In other words, from the mid-seventeenth century onward the central government seemed believe that keeping records of the rescripts in response to petitions from Ottoman subjects was important. While this development, especially the practice of keeping separate registers for each province rather than common petitionary registers for the entire empire, clearly signifies a bureaucratic shift by the central administration (similar to the developments uncovered by Linda Darling vis-à-vis financial registers and institutions[49]), this study anticipates that it also points to the much broader social, administrative, and legal concerns of the Ottoman state.

There are also indications that the government's focus on keeping petitionary records was not limited to the judicial and administrative institutions in the imperial center. James E. Baldwin's research shows us that the earliest available registers of the governor's council (the "*pasha*'s *diwan*") in Cairo dates to 1741–43 and this perfectly coincides with the changes happening in petitionary registers in the Ottoman center.[50] He predicts that the records were kept by the council as an institution from this date onward, whereas they had been kept by individual governors before this point. This information is worth considering; perhaps we need to think about Ottoman imperial policies through the judiciary on a larger scale, though this requires further research on other provincial councils at that time, since researchers, with two exceptions, have not documented the registers of other governor's councils yet.[51]

48 Suraiya Faroqhi points to this methodological difficulty and questions the problem of establishing a direct correlation between the increase in documentation and the increase in petitioning. Faroqhi, "Guildsmen Complain to the Sultan," 182–184.

49 Darling links this bureaucratic development to demographic and economic conditions that triggered complaints about high taxes and requests for reassessment from the seventeenth century onward. Yet, she also accepts that she cannot verify such an increase in complaints because of the lack of systematic documentation of petitions. Darling, *Revenue-Raising and Legitimacy*, 247–280.

50 Baldwin, "Islamic Law in an Ottoman Context," 36–37 and n. 24.

51 Michael Ursinus found, by chance, a record book of complaints of Rumeli *kaymakam* (governor or head official of the district) in the court records of Manastır; it covers the

First, there seems to have been an interest in controlling legal processes by keeping records of imperial decrees written in response to petitions. It would seem that the central bureaucracy, in an effort to increase efficiency, began to register legal procedures and processes. Darling reveals that the enlargement of the finance department, the increase in financial bureaucracy, and the registration of a larger number of complaints directed to that department was an outcome of the central administration's greater involvement in the collection of *avarız* taxes and tax-farming in the first half of the seventeenth century. Thus, she argues that "petitioning the central government came to represent, not the failure of other levels of authority, but their subordination to the imperial level in tax matters."[52] While the tax-farming system became more provincially administered through lifelong tax-farming in the eighteenth century, the distribution of the short term and lifelong contracts still necessitated an Istanbul nexus under the supervision of the Sublime Porte to regulate auctions and all sorts of transactions between shareholders.[53] All these transactions, as well as the controversies that occurred between parties, were still being registered one hundred years later, even though the central tax collection, as Darling explains, had ended. Furthermore, Salzmann illustrates that the growing power and abuses of the provincial government headed by *voyvoda* (tax farm supervisors) in eighteenth-century Amid (Diyarbekir) came under scrutiny in various petitions to the imperial center from a variety of contractors, venal officeholders, and provincial authorities, as well as by the shareholders in the larger tax-farms. The latter groups had personal ties to members of the religious and administrative hierarchy in Istanbul and were able to pursue their grievances there.[54]

Yet, the empire was a vast polity; corruption and abuses could not be controlled or even heard by the imperial center if there was not a system to transmit complaints to Istanbul. Therefore, the collection of illegal fines and extra

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years 1781 and 1783. Michael Ursinus, *Grievance Administration* (*Şikayet*) *in an Ottoman Province: The Kaymakam of Rumelia's "Record Book of Complaints" of 1781–1783* (New York: Routledge Curzon, 2004). Baldwin documented twelve of the governor's council of Cairo in the Diwan al-'Ali series—two are from the eighteenth century and the remainder date from the early to mid nineteenth century, yet he only worked on the earliest, from 1741 to 1743. Baldwin, "Islamic Law in an Ottoman Context," 31–74. For a discussion of possible reasons behind the lack of other provincial registers, see ibid., 37.

52 Darling, *Revenue-Raising and Legitimacy*, 280.

53 Salzmann, *Tocqueville in the Ottoman Empire*, 75–121.

54 Salzmann also argues that "inherently divergent interests in the institution of tax-farming. . . provided an additional firewall against a monopolization of legal, financial, and coercive control." Ibid., 167–168.

court fees by local judges, collaboration among provincial officials, shareholders of tax-farms, and the practice of farming out the office of the deputy judge were all eighteenth-century Ottoman realities.[55] The very fact that they were scrutinized and measures could be taken against them through the petitioning process should have prompted the imperial government to increase the efficiency of legal bureaucracy and record keeping in Istanbul.

Furthermore, keeping the "myth of justice" and the image of the "just ruler" alive in the eyes of Ottoman subjects was, certainly, important to maintaining the legitimacy of Ottoman central power. The ancient idea of a "circle of justice" that defined the legitimacy of the ruler in his reciprocal relationship with his subjects by way of production, taxation, and justice found its way into the Ottoman polity through its intrinsic emphasis on institutionalized governmental structures.[56] In that sense, accepting and responding to petitions through imperial decrees sent to local legal and administrative authorities, and regulating the system through bureaucratic state structures was an effective

55 İnalcık believes that the corruption of the local *kadı*s and the legal system increased in the eighteenth century. İnalcık, "Mahkeme;" "Adaletname." Zarinebaf lists farming out of the office of the deputy judge, collection of higher court fees, and the introduction of fines as a form of punishment as possible sources of corruption and venality in the eighteenth-century Ottoman legal system. She also gives examples, during the eighteenth century, of Istanbul *kadı*s removed from office for corruption. Finally, she states that "the petitions of the women of Istanbul against corrupt judges and superintendents of pious foundations made up 24,5 percent of all petitions in 1675." Zarinebaf, *Crime and Punishment in Istanbul*, 144–146, 151, 164; Fariba Zarinebaf-Shahr, "Women, Law and Imperial Justice in Ottoman Istanbul in the Late Seventeenth Century," in *Women, the Family, and Divorce Laws in Islamic History* (Syracuse, NY: Syracuse University Press, 1996), 89. Ergene claims that corruption and bribery were intrinsic to the applications of local courts and there is significant archival documentation of the corruption and the illegal practices of *kadı*s in Anatolia and Rumeli in the seventeenth and eighteenth centuries. At the same time, he emphasizes the necessity of focusing on the relationship between the court and the community, rather than the corruption itself, in order to understand why and how different segments of society, both the wealthier and lower classes, continued to frequently utilize the courts. He thus problematizes the state-centered equation of justice, legitimacy, and the use of the legal system in Ottoman historiography. Ergene, *Local Court, Provincial Society, and Justice*, 99–124. More recently, Ergene argues that fines as a form of Ottoman penalty declined during the seventeenth and eighteenth centuries as a result of law-enforcers' increasing corruption and the abuses of fines due to high inflation rates, the localization of political and administrative control, and the institution of lifelong tax-farming. Metin M. Coşgel et al., "Crime and Punishment in Ottoman Times: Corruption and Fines," *Journal of Interdisciplinary History* 43, no. 3 (2013).

56 Tuğ, "Gendered Subjects," 4.

way of keeping the image of the just ruler alive. Although the system never worked perfectly and was not as "ideal" as conventional Ottoman historiography suggests[57] it is evident that it served as a "safety valve"[58] that prevented further and more radical discontent in the society.

However, as important as regular concerns about legitimacy, petitions provided the central government with plenty of information about the course of local events in the provinces and thus they enabled the state to monitor local power holders and administrators. From another perspective, we can also read petitions "as an offer by the local population to collaborate with the central authorities in working against intermediate power holders."[59] At a time when the central government was concerned about the rise of strong provincial ruling families and "banditry"—particularly during the seventeenth and eighteenth centuries[60]—petitions allowed it to gather information about local developments and collaborate with certain groups against others in its struggle with local power holders and even with its own provincial administrative authorities. One can even argue that the Ottoman state appeared to promote its central judicial institution over both Ottoman subjects and provincial *kadıs* in order to monitor power struggles at the provincial level. On this point, needless to say, neither side acted with a concept of absolute ideal justice. Yet, there is enough evidence, as the remainder of this chapter reveals, to show that provincial groups and the central state used this two-way interaction and means of petitioning when their interests coincided.

As John Chalcraft observed in relation to peasants petitioning the state in late nineteenth-century Egypt, petitionary documents in the archives "evoke not passivity, silent subversion, or outright revolution but, surprisingly, sophisticated engagement and negotiation with state practice and discourse."[61] Just as the state utilized petitions as a legitimizing device or "safety valve" by taking sides with its subjects—at least symbolically if not always actually—and depicted itself as their "protector" against abusive officials and other local power holders, so also subjects made strategic use of the image of the "just ruler" to

57 For the idealization of the "right to petition" in the Ottoman system, see Halil İnalcık, "Şikayet Hakkı," in *Osmanlı'da Devlet, Hukuk, Adalet*, ed. Halil İnalcık (Istanbul: Eren, 2000).

58 Lex Heerma van Voss, "Introduction," *International Review of Social History* 46, no. supplement S9 (2001): 4.

59 Ibid.

60 Barkey, *Bandits and Bureaucrats*.

61 John Chalcraft, "Engaging the State: Peasants and Petitions in Egypt on the Eve of Colonial Rule," *International Journal of Middle East Studies* 37 (2005), 304.

assert their potentially dangerous causes in a power-laden context.[62] Thus, I approach the petitioning process as a site of intervention and inscription of power, as well as a site of contestation wherein Ottoman subjects encountered, embodied, and resisted these inscriptions.[63] Just as one should keep in mind that the early-modern state was not an absolute power, we should also remember that the agency of the subject in an early modern state structure—and even in a modern state structure—cannot be characterized in terms of absolute resistance or intervention.

Yet, despite petitioning as a legal means, the interventions of political power and the resistance of subjects cannot be confined to the juridical sphere. Surveillance does not necessarily lead to execution, however, having knowledge of something is the first step to controlling it. Monitoring its subjects and spying on the population of the Ottoman Empire did not start with modern state apparatuses; by strategically placing informants and spies, the Ottoman state monitored public places, like coffeehouses and public baths, from the late sixteenth century onwards, especially in times of political and social crises. Even though early-modern forms of surveillance aimed to prevent and punish "seditious" elements in society, the government was not successful enough to "penetrate the social fabric" and permanently monitor the population.[64] In this context, listening and monitoring through petitions served as such an early-modern surveillance practice. Within the boundaries of its limited administrative techniques of social control, the Ottoman government collected information by promoting voluntary "spying" activities through its efficient bureaucracy and system of petitioning. As the following sections of this chapter reveal, most petition cases did not end up with criminal charges or a formal judgment from the Imperial Council or the local court. In this sense, petitions provided the Ottoman imperial government a way to monitor its subjects through their voluntary submissions to this particular legal mechanism and Ottoman subjects and provincial groups in return found a means (one that was not merely controlled with punitive action) to reflect upon and maneuver within the political and public sphere.

62 Ibid.; Faroqhi, "Political Activity among Ottoman Taxpayers," 16.

63 Canning, *Gender History in Practice*, 168–180.

64 As opposed to the new "constitutive" forms of surveillance, which were a means for the Ottoman state to act upon, and to shape and manage the "population" and the public sphere after the mid-nineteenth century. For an extended comparison of these two forms of governance, i.e., the early-modern and the modern, see Cengiz Kırlı, "Surveillance and Constituting the Public in the Ottoman Empire," in *Publics, Politics and Participation: Locating the Public Sphere in the Middle East and North Africa*, ed. Seteney Shami (New York: Social Science Research Council, 2009).

Reporting Sexual Violence

A closer analysis of the case mentioned at the beginning of this chapter helps us understand petitioning as a legal as well as a political means to reflect upon those matters that were considered most disturbing at the local level. It also reveals how an ordinary case of sexual violence could become a complicated social issue and end up as part of a sophisticated engagement with the legal bureaucracy of the Imperial Council. The transcription of the case as it is recorded in the Anatolian *Ahkam* register follows:

> It is decreed to the governor of Teke and Hamid *sancak*s (sub-division) and the judges of Homa and—[65] that,
>
> You, Mehmed, the judge of Homa and Gedikler towns, sent a letter to my «Gateway to Felicity» [the Imperial Council in Istanbul] and reported the following:
>
> Dumanoğlu Hasan, an inhabitant of Homa, came to the court and declared, in the presence of es-Seyyid Bekir, an inhabitant of Homa, that an underage girl named Emine, daughter of Hasan, was married by her grandmother in the presence of two witnesses to his (Dumanoğlu Hasan's) son, Mehmed, and [they] pledged that she would remain in her mother's home until reaching puberty. However, before reaching puberty, she was abducted by İvas and his son, inhabitants of the same town, while she was returning from the public bath. After a few days, having claimed that the girl declared that she had reached puberty and that she did not accept the marriage contract, İvas and his brother İsmail tied her up by the hands and ankles in their house and they let their son have his way with the aforementioned girl (*oğullarını mezburenin üzerine bırakıp*). When these men (İvas and İsmail) were questioned in court, they answered that because the girl was not a virgin at all from the beginning their son had not done anything to her. The aforementioned [girl], who escaped from their hands on that day, asked the court to write a judicial notification (*ilam idiver*) saying that İvas and İsmail had violated her virginity. Some of the inhabitants of the town were asked about the reputation of these men and they said before the court, "This deed must have been done by these men. They are not free from such malice and mischief, and none of us are happy with them either." Furthermore, they also insisted on saying, "You, the governor, resolve this case in accordance

65 The name of the second town is left empty in the document.

with *shari'a* and notify the [Imperial Council] of the actual state of the case to stop them from [further] harm."

Thus, as requested, this was written to notify you of my imperial decree that the case be judged in accordance with *shari'a* (in the local court) in the manner described.[66]

Despite the fact that the case itself is very intriguing, we must first decipher the legal record itself in order to understand the bureaucratic procedures the parties were involved in. First, this record is the summary of an imperial rescript addressed to the governor and two judges of the Teke and Hamid region (today the environs of Burdur and Antalya). This rescript was in fact written

FIGURE 2.3 *Emine's case from the Anatolian Registers of Imperial Rescripts.* PRIME MINISTRY ARCHIVES. BOA, ANADOLU AHKAM DEFTERI 1, CASE 399 (ŞABAN 1155/OCTOBER 1742).

66 BOA, Anadolu Ahkam Defteri 1, case 399 (Şaban 1155/October 1742).

as a response to an official notification written by one of these judges to the Imperial Council. Yet, according to the narrative in the summary of the imperial rescript registered in the Anatolian *Ahkam* registers, this legal action did not arise at the initative of the judge or the governor, but rather it was made at the request of the litigants and legal witnesses' in the local court trial. Thus, we also learn from the record of the imperial rescript that a series of court trials were held locally because Emine asked the judge and the character witnesses asked the governor to write a judicial notification (to the Imperial Council) stating that İvas and İsmail were guilty of rape in this event. It is not clear, initially, from the record if Emine wanted the local *kadı* to write a notification to the governor's council or to the Imperial Council, whereas it is clear that the witnesses were heard in the governor's council and they [the witnesses] requested that the case be sent to the Imperial Council. In other words, we cannot understand clearly if the case was held first in the local court and forwarded to the governor's council as a result of Emine's request, or if only one court trial was held by the *kadı* in the governor's council.

Even though the community and the girl did not send the case directly to the Imperial Council by writing a petition to Istanbul, they still requested and even insisted on notifying it by means of the governor and the judge. Thus it becomes clear that the local people perceived that the Imperial Council had a double function: on the one hand, it resembled a court of appeal, in that it was applied to after a previous trial had taken place, but, on the other hand, it was a parallel judicial mechanism to which people could directly apply without a former judgment at the local court. In this specific case, we do not see people petitioning against a judicial decision given by the *kadı* or the governor. The narration of the event in the imperial rescript does not refer to any previous judicial decision. Yet, the Imperial Council sent the case back to the local authorities, as generally happened in most of its replies written in response to such notifications and petitions. Then, why would Emine and the community insist that the case be sent to the Imperial Council when there seems to be no previous judgment to appeal against?

There are many intriguing and unresolved issues in the narration of the rescript: How and when did Emine lose her virginity—before or after the abduction; what was the nature of the abduction—was it Emine's voluntary escape or a kidnapping by force; and, therefore, what was the nature of the sexual intercourse if it happened, and if it did, was it rape or voluntary fornication. Although it is not possible to answer these questions with the data available in the imperial rescript, we can speculate on the complexity of the situation and draw some conclusions for our own understanding, to establish why such a case might have been sent to the central government.

Furthermore, the sequence and the shape of the story in the imperial rescript help us to clarify seemingly unresolved issues and contradictory points in the narration of the event. Here we must remember that what David Sabean said about early-modern protocols of the eighteenth-century church consistory in Germany is also valid for Ottoman imperial rescripts—as well as court records—of the same epoch: What the pastor and other judges considered the case to be about, in fact, determined what the story related, what issues were ignored, and how the events were re-sequenced on the same temporal plane within a causal structure. That is, these factors determine how the "punch line," i.e., the punishment or the outcome at the end of each protocol, as Sabean calls them, was justified by the account itself. So, the punch line "allows a story to have a plot that is to come to an end."[67] Therefore, the way Emine's kidnapping was narrated in the imperial rescript is important for us to understand, as this tells us what was the most important issue at stake for the parties involved in the production of the legal document, i.e., for the litigants, the judge, and the central government. There are multiple layers of information that sometimes seem to contradict each other in the narration. Yet, careful wording and the re-sequencing of the events in fact justifies one version of the plot and thus implies the outcome local authorities must reach.

First, there is the question of who first brought the case to the court; we see that it was the groom's father rather than Emine herself and her husband. Since she was already married to the groom, Mehmed, and both the bride and the groom were probably minors at that point, the father-in-law, instead of the groom could have been considered her guardian. Yet, he (the father-in-law) might have suspected (that Emine was not abducted or raped, but she herself escaped to İvas's son) and petitioned the court to claim that she later made up a story of abduction, even if she escaped. In their testimony, the accused men claimed that Emine denounced her marriage to Mehmed when she reached puberty; thus they implied such a possibility.[68] Furthermore, in the Ottoman legal structure, a rape case must be brought by the victim, that is, by the

67 Sabean, "Peasant Voices and Bureaucratic Texts," 69–70, 74, 92 n. 4.

68 According to *fiqh* (Islamic jurisprudence), a woman could reject a marriage that was arranged for her while she was still a minor, but only when she reaches puberty, i.e., has her first menstruation. This was called the "option of puberty;" the annulment of the marriage contract must be made in court. By claiming that Emine rejected the marriage to Mehmed, the accused men implied that she was not willing to marry Mehmed, and if there was an escape, then the sexual act was voluntary. Furthermore, they might have wanted to reduce the possible punishment for rape by claiming that the girl was not a minor at the moment of the rape. For more information on the "option of puberty" and historical examples in the Ottoman context, see Başak Tuğ, "Ottoman Women as Legal and

woman herself, but fornication cases can be brought by others.[69] However, various examples from Ottoman court records also show that this principle was not necessarily applied in practice.[70]

Yet, the narration of the event as reflected in the report of the local judge in the imperial rescript apparently supports Emine's claim that she was raped. The accused men's defense against the rape accusation was that Emine was not a virgin and she had rejected her marriage when she reached puberty—this is narrated as a "claim;" yet the sexual assault by İvas and İsmail is described in detail as a "fact." Furthermore, the testimony of Emine and the character witnesses quote the party's statement about the accused men and request that the central government be notified. One still wonders why the litigants and witnesses insisted that their case be sent to the Imperial Council, regardless of whether or not the judge's report and the imperial rescript believed their side of the account. The local court trial must have reached a point at which the litigants thought that sending the case to the Imperial Council would be beneficial to support their claim and increase the penalty of the accused.

At this point, it is useful to understand the process of a criminal lawsuit is brought to an Ottoman *kadı* court. A criminal case heard by the *kadı* can be described schematically as the following: when a criminal lawsuit was brought before the *kadı*, he investigates the case, meaning, he listens to the plaintiff(s)' accusations against the defendant and the acceptance or denial of the accusations by the accused; then he asks the plaintiff(s) for evidence and records whether they could bring evidence or not, and the type of evidence they have; later, if the evidence is not sufficient, the plaintiff could request that he ask the defendant for his oath; and finally, he asks for depositions from the witnesses about the event and/or the reputation of the defendant.

After these stages, there were four possible resolutions to criminal cases (these possibilities are also clear in the Ankara and Bursa court records). The first two possibilities are registration of the court investigation without judgment, or registration of an amicable settlement (*sulh*) between the parties, not including judgment from a *kadı*. The other two possiblities, the exoneration of

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Marital Subjects," in *The Ottoman World*, ed. Christine Woodhead (London: Routledge, 2012), 366–369.

69 Peirce, *Morality Tales*. According to Sonbol, this is related with the fact that Ottoman courts treated rape as an issue of personal rights rather than a problem of public order. See, Sonbol, "Rape and Law in Ottoman and Modern Egypt," 219–221. This comes from the principle division in Islamic law between the claims of men (private) and the claims of God (public).

70 Rape cases in the Ottoman courts are analyzed in more detail in the following chapters.

the accused (i.e., "judgment for abandonment;" *kaza-i terk*), or a sentence in favor of the plaintiff (i.e., "judgment for recompense;" *kaza-i istihkak*), include the *kadı*'s judgment, but do not necessarily specify the requirements and conditions of the sentence in terms of punishment.[71]

In Emine's case, it would seem that the *kadı* followed the first possibility, that is, he registered the stages of the investigation without any judgment. After the court record explains the steps of the investigation, it ends with an indication that "the depositions of the witnesses were sound and reliable and the case was recorded in the registers at the request of the litigants." Some cases of bodily harm, homicide, and sexual assault were recorded as such in the Ankara and Bursa court records. Such a court certificate (*hüccet*) was generally requested by one of the parties to be used as evidence of guilt (for the plaintiff) or of innocence (for the defendant) in future or ongoing disputes. For example, in one case, the husband of a woman named Ayşe requested that the Ankara court examine the body of his wife, who had been hit by another woman named Ayşe in the public bath and had had a miscarriage as a result; he wanted the court to register that he and his wife held only Ayşe accountable for this miscarriage, not other neighbors.[72]

As in Emine's case, people also obtained such court certifications (*hüccet*s) in order to appeal directly to the governor's council or the Imperial Council. For example, Hüseyin requested that the Ankara court supply him with a copy of the court document (*suret-i sicil*) certifying the depositions of witnesses who testified to the confession of guilt by the two men who entered Hüseyin's house and assaulted his wife. Since these two men escaped punishment, although they "confessed" their guilt according to Hüseyin's testimony, he requested such a document from the court. He most probably intended to take his case to the council of the governor in the provincial center or that of the grand vizier in Istanbul.[73] Often, obtaining a court document recording the depositions that favored the plaintiff was a strategy to strengthen the petitioner's claim before the Imperial Council. In Emine's case, the difference is that the litigants did not bring the court certification directly to the Imperial Council, but requested that the *kadı* forward it.

The third possibility, that is, the exoneration of the accused, does not seem to have been an option in Emine's case in the local court. In cases in which the accused is exonerated, the *kadı* acquits the accused party because the

71 These different forms of resolutions as well as the judgments and punishments are discussed later in detail with examples throughout the study.

72 ACR, 124, 87 (15 Muharrem 1158/17 February 1745).

73 ACR, 121, 264 (26 Cemaziye'l-ahir 1155/28August 1742).

plaintiff did not produce sufficient evidence and/or the witnesses testified to the good reputation of the former. This judgment was identified as "judgment for abandonment" (*kaza-i terk*) since the court trial was abandoned to the plaintiff's disadvantage. In such cases, the *kadı* generally asked (at the request of the plaintiff) that the accused party take an oath. The imperial rescript summarizing the local court trial does not mention that the accused took an oath. Furthermore, it explicitly states that the witnesses gave testimony to the evil character of the accused men (i.e., to the bad reputation of the accused). Therefore, it would seem that the local *kadı* did not face any legal obstacle to giving a judgment in favor of the plaintiff. At the same time, there is no reason for the litigants to approach the Imperial Council with the hope of reaching an amicable settlement (*sulh*) with the other party, since they were already in a legally advantageous position. Research on amicable settlements in the early-modern Ottoman courts shows that people generally sought amicable settlements, through either judicial or extra-judicial methods, when the legal case reached a deadend because the defendant denied the accusation and/or there was a lack of sufficient evidence to prove the guilt of the accused.[74] In Emine's case, the court trial seems to have proceeded to the advantage of the litigants.

Yet, there could still be other reasons for the litigants to request that the case be sent to the Imperial Council before the *kadı* gave a judgment. If Emine wanted the case sent to the governor's council first, and the witnesses requested that it be forwarded to the Imperial Council, this shows that the litigants had an understanding of the judicial hierarchy of the three institutions. My study and others claim that there was in fact an appellate mechanism that allowed for a revision of judgment in the Islamic legal system, contrary to the conventional view that the *kadı*s' decisions were final and irrevocable.[75] In addition to the Imperial Council being the highest superior council to which people could directly appeal, by the seventeenth century the provincial governors also held their own *divan*s in the provinces with the assistance of the provincial *kadı*s whose supervisory prerogatives over the lower level *kadı*s in their regions were already established.[76] Data in the Imperial Council

74 Tamdoğan, "Sulh and the 18th Century Ottoman Courts of Üsküdar and Adana;" Boğaç A. Ergene, "Why Did Ummu Gulsum Go to Court."

75 For a detailed discussion of this point, see Chapter 5.

76 Gradeva, "On Judicial Hierarchy in the Ottoman Empire;" Ursinus, *Grievance Administration*; Eyal Ginio, "Coping with the State's Agents 'from Below:' Petitions, Legal Appeal, and the Sultan's Justice in Ottoman Legal Practice," in *Popular Protest and Political Participation in the Ottoman Empire: Studies in Honor of Suraiya Faroqhi*, ed. Eleni Gara, M. Erdem Kabadayi, and Christoph K. Neumann (Istanbul: İstanbul Bilgi Üniversitesi, 2011).

registers and in the court records confirms that, in the mid-eighteenth century, the governor of Anatolia held his own *divan* in Kütahya, the capital of the Anatolian province, and some cases were forwarded to this *divan*.[77] Further archival references indicate that the governors of other provincial centers of Anatolia also heard cases in their own *divan*s, as apparently happened in Teke with regard to Emine's case. Tamdoğan also points to the parallels between the grand vizier's (Imperial) Council in Istanbul and the governor's council of Adana in the eighteenth century and provides court cases forwarded to the Adana governor, both for supervision and executive purposes and for a trial in his own council.[78] Finally, Baldwin's study on the registers of the governor's council in eighteenth-century Cairo explicitly reveals the judicial functions of the governor's *divan* in a variety of matters.[79]

The judicial functions of the governors' *divan*s have yet to be explored, as only two registers of such *divan*s have been discovered and studied thus far.[80] However, in principle, governors were the representatives of *siyasa* authority in the provinces. The judicial hierarchy, or the appellate mechanism, primarily functioned in *siyasa*-related matters such as public order, the collection of taxes, wrongdoing, and criminal issues committed by state officials, meaning *ehl-i örf* and *kadı*s.[81] However, we must reiterate that these matters were not outside *shari'a*, nor necessarily outside the domain of the *kadı* courts.[82] Furthermore, the jurisdiction of the provincial court was not limited to public order, since the provincial governors and their courts received petitions from Ottoman subjects in a variety of matters, like the grand vizier and the Imperial

77 For some examples, see BOA, Cevdet Adliye, 2990; BOA, A.DVN.ŞKT, folder 28, petition 94; BOA, A.DVN.ŞKT, folder 3, petition 80; BOA, A.DVN.ŞKT, folder 67, petition 142; BOA, A.DVN.ŞKT, folder 67, petition 52 and BOA, Anadolu Ahkam Defteri 3, case 626.

78 Tamdoğan, "Qadi, Governor and Grand Vizier."

79 Baldwin, "Islamic Law in an Ottoman Context," 31–74.

80 Ibid.; Ursinus, *Grievance Administration*.

81 Gradeva, "On Judicial Hierarchy in the Ottoman Empire," 20–21.

82 Previously, historians like Halil İnalcık separated the legal domains and therefore the judicial institutions, of the public (concerning military and administrative issues, thus, secular) and the private (concerning the *shari'a*). Gerber, *State, Society and Law in Islam*, 127–173; İnalcık, "Şikayet Hakkı." Yet, recent research like that of Eyal Ginio approaches the division of labor between the governors and/or the imperial councils and the *kadı* courts as a "collaboration," particularly in the trials of habitual criminals and other serious crimes. Ginio, "Coping with the State's Agents," 48–49. For a similar approach, also see, Gerber, *State, Society and Law in Islam*, 61–78; Zarinebaf, *Crime and Punishment in Istanbul*, 148–156.

Council did in Istanbul.[83] In Emine's case, even though there was no appeal against a previous judgment by the local court or the governor's council, suspicions about "the formation of networks of support between local military officials, local administrators like the *kadı*, and prominent individuals and interested parties"[84] might have instigated the litigants to activate the judicial review mechanisms.

Yet another reason behind the litigants' wish to involve the Imperial Council in their case relates to the symbolic social meaning of the petition. If Emine was, in fact, abducted and raped and her father-in-law brought the case to the court, the girl might still have insisted on sending the case to higher authorities to prove or support her claim that she was telling the truth—because normally rape victims (or their guardians), as the ones who ought to initiate the litigation, had to prove their allegations before the court.[85] Therefore, the act of willingly sending a case to a higher authority in itself may have had the symbolic and strategic meaning of showing that the accused (in this case Emine, because of the suspicions about her virginity), is confident of her position in the quarrel. Thus, her insistence that the case be sent to the Imperial Council may have been a strategy employed by Emine, whether she escaped from her marriage and home and went to her abductors voluntarily or had not been a virgin at that time. Furthermore, by daring to send the case all the way to the Imperial Council in Istanbul, litigants also showed—symbolically—that they have the power and resources to fight the defendants.[86] For that reason, Emine's or the community's insistence on sending their case to the Imperial Council can be read as a strategy of dispute resolution by which socially and legally important means are activated.

Furthermore, sending a case to the central government and requesting a decree might have had a very practical legal function for the local *kadı*: While the imperial decrees, in general, did not give judgments, their tone implicitly

83 There are also many examples in the court records and the registers of imperial rescripts throughout the empire that blur the division of jurisdiction between *divan*s and *shari'a* courts. Galal H. El-Nahal, *The Judicial Administration of Ottoman Egypt in the Seventeenth Century* (Minneapolis, MN: Bibliotheca Islamica, 1979), 33–34; Abraham Marcus, *The Middle East on the Eve of Modernity: Aleppo in the Eighteenth Century* (New York: Columbia University Press, 1989), 107f, 14f, 16f; Gerber, *State, Society and Law in Islam*, 76. Ursinus, *Grievance Administration*, 5–8; Baldwin, "Islamic Law in an Ottoman Context," 39.

84 Ginio, "Coping with the State's Agents," 52.

85 Sonbol, "Rape and Law in Ottoman and Modern Egypt," 219.

86 Baldwin calls this performative act and the barrage of authoritative documentation as "the intimidating effect of petitioning." Baldwin, "Petitioning the Sultan in Ottoman Egypt," 516–518.

guided the *kadı* toward a certain judgment. The phrasing and wording of the imperial decree, and the way it supported the petitioner's or the defendant's cause (this was more apparent in cases of "banditry" that I analyze later) might have directed the *kadı* who would ultimately decide the case. More importantly, as this study reveals in the discussion on punishments (detailed in Chapters 4 and 5), the *kadı* seemed to pronounce his judgment more independently on lesser penalties such as flogging and the banishment of certain people from the neighborhood than he did on the relatively more severe penalties for which he needed the approval of a higher authority. In that case, the *kadı* would know that he needed to forward a serious sexual crime case that was in fact proven by the plaintiff according to the common disposition of conviction in the Ottoman courts. In such an instance, we should also discuss the popular understanding of the legal disposition on the litigants' side. By requesting that the *kadı* report their case to the Imperial Council the litigants actually did two things at the same time: First, they showed their knowledge of legal processes. Second, they asked the *kadı* to get approval from higher authorities to punish the culprit. From this perspective, the way the Imperial Council forwarded the case back to the governor and the local judges does not seem to be a vicious circle; rather it is more an approval of the conviction and an order to carry out a legal judgment and enforce it by the local authorities.

The historian interpreting this case is well aware that these possible scenarios cannot be verified with the available data. I do not claim that one scenario overrides the other. As readers may note, some of these cases and motives may in fact overlap. Emine may have strategized that by requesting the case be sent to the Imperial Council, she had a better chance to clear her reputation of the blame of not being a virgin. The local courts had a legal disposition to send serious sexual offense cases to higher authorities, and finally, the local *kadı* had his own suspicions about the case. Although it is almost impossible to know each party's intention in taking a legal action, it is highly likely that each party had their own reasons and intentions in taking an initiative. Thus, "the historian's task is to offer a fuller range of moral standpoints rather than a closed, one-dimensional account of his own," as Sabean has stated.[87] The historian interpreting the legal protocol (i.e., the registers of imperial rescripts) does not want to "substitute" her "form of objective prose—another administered story—for that of the protocolant," but rather attempts to open up the various social, political, and legal possibilities of the records to the different standpoints of the actors.

87 Sabean, "Peasant Voices and Bureaucratic Texts," 89–90.

Actors, Strategies, and Rhetoric

The example above shows us that a litigants' request that a petition be sent to the Imperial Council was not so much a request for the imperial center to resolve their dispute by obtaining an adjudication in the Imperial Council as it was a way to facilitate or intervene in the local legal judgment and enforcement processes. Petitions sent directly by Ottoman subjects to the Imperial Council reveal that the petitioners were in fact more concerned about having a stronger litigation in the local court or in a higher court in the judicial hierarchy than they were in seeking a resolution in the Imperial Council. In many instances, people had problems bringing their cases before the local court because local administrators resisted trials or applied extrajudicial procedures. Petitioners who were unable to hold out against certain power holders at the local level applied to the imperial center. In the current and following chapters, I analyze petitions concerning sexual offense cases in order to reveal the important role honor played in this discourse of victimization. I use the term victimization not to deny that the petitioners were real victims, but to emphasize the element of strategy in selecting and highlighting certain notions to describe their situation.

Before analyzing certain cases, and in order to clarify what I mean by strategies developed by Ottoman subjects to maneuver within existing power structures and explain the use of petitioning as a means of using one power cluster against another in their struggle, I discuss briefly the methodological constraints of using petitionary records as a source for historical analysis. First, the format of petitions and imperial decrees was very limited in terms of factual information. With regard to the identity of the petitioner, we have only the name, therefore we know his/her gender, rarely her profession, and finally, which district she was from.[88] If we are fortunate, we can glean some information about the social and familial networks of the petitioner.

More importantly, we do not hear an uninterrupted and authentic narrative in the words of the people themselves.[89] By the time we see it in the imperial rescript registers, more than one legal intermediary has injected his own interpretation into the narrative, as we see in Emine's case. On the one hand, the initiative of the petitioner is pivotal in starting the petitioning process, since the petitioner or the network around her decides to go or send her petition all the way to the Imperial Council. On the other hand, the entire petitioning process is mediated by multiple actors and institutions in which the petitioner herself

88 I use "she" and "her" to substitute for he/she and his/her for practical purposes.

89 In contrast to the letters of remission in first-person narratives from sixteenth-century France, as examined in Davis, *Fiction in the Archives*.

played a role and, moreover, learned more about the legal culture through this "forum shopping."[90]

We know from the documents that the legal process of a simple petition works as follows: A certain X, or her network, takes the initiative to bring her case before the Imperial Council (following or without a previous local court trial). She finds a petition writer in her locale or in Istanbul (if she goes to Istanbul to submit her petition personally to the Imperial Council). She may have her petition written—and even sent—by the local *kadı*. If she goes to Istanbul, she generally receives a judicial opinion (*fetva*) from the *şeyhülislam* by asking him a judicial question about her case in order to support her cause before the Imperial Council. Then, she or her agent submits the petition to the Imperial Council. The chancellors in the Imperial Council send the petition to the relevant office of those that specialize in different topics. After the necessary investigation with regard to the reliability of the petitioner's claims, an imperial decree is written at the top of the petition summarizing the verdict or rescript. Then, a detailed imperial order is written and sent to the judge(s) and/or the governor(s) of the locale that the petitioner comes from. In addition to these (the summary of) the imperial order, is recorded in the relevant registers of the Imperial Council.[91]

As depicted above, a petition and its narrative travels from one person to another—from the petitioner, the petition writer or the local judge, to the office of the *şeyhülislam* (albeit not always), various Imperial Council chancellors, and finally to the local governor and the judge. In this regard, to be able to petition the Imperial Council, the petitioner must have engaged in serious "forum shopping" in the legal sphere in order to get an effective result out of this process. At the same time, petitioning was a process of trial and error, one in which the petitioner learned about the legal system and its intrigues. Furthermore, the petitioner must be a part of this complex process to try to take control of it.

90 I adopt Ido Shahar's definition of "legal forum shopping." He defines it as the litigant's choice to have her action tried in a particular court or jurisdiction where she feels she will receive the most favorable judgment or verdict. Shahar, "Legal Pluralism and the Study of Shari'a Courts," 124. Also see Ron Shaham, "Shopping for Legal Forums: Christians and Family Law in Modern Egypt," in *Dispensing Justice in Islam: Qadis and Their Judgements*, ed. Muhammad Khalid Masud, Rudolph Peters, and David Stephan Powers (Leiden and Boston: Brill, 2006).

91 The depiction of the petitioning process here is of course simplified and generalized; it does not contain details, as it is just for the purpose of envisioning the stages and actors that a petition may involve. I explain the subject-position of each of the various possibilities of petitioning in a detailed way throughout the chapter.

First, the petitions themselves, with a few exceptions, were written by petition writers (*arzuhalci*s) in a very formulaic style, not by the petitioners themselves. Here, after meeting the petitioner himself/herself, we encounter a second important actor in the Ottoman context of petitioning. Interestingly, throughout the entire petitioning process the identity of the petition writer never comes to light and he is, therefore, the most mysterious character in the process, yet he is also the one who knows the most about and directs the entire process of petitioning. Given the formulaic and professional style of the petitions and the low rate of literacy in the Ottoman Empire during the eighteenth century, it should not be surprising that petition writing was a professional activity, in fact, one regulated by the central government. Since the petitions they composed were to be submitted directly to the Imperial Council, petition writers were required to know the details of the *shari'a* and the *kanun* as well as of financial matters,[92] and even to know to which department of the Imperial Council the petition should be submitted. Furthermore, the language of the petition had to conform to the legal terminology of the Imperial Council so that they could communicate with each other, as I explain in detail later.

The profession of petition writing was a kind of monopoly in the hands of the retired scribes of the various departments of the Imperial Council; they were well-informed of the bureaucratic procedures in the Imperial Council.[93] Even though information about the exact date of the evolution of the guild structure of the petition scribes is unknown, Evliya Çelebi, the famous Ottoman traveler, defines the profession as the "guild of petition scribes" (*Esnaf-ı Yazıcıyan*) and reports that in the mid-seventeenth century there were 500 petition writers with 400 offices in Istanbul.[94] An imperial decree dated 1178/1764–65 also indicates that admission to the profession had been regulated "since former times" (*kadimden beri*) through a certificate (*tezkire*) given by the chief of petition writers (*arzuhalci-başı*), the trustee and the secretary of the sultan's guardians (*çavuşlar emini* and *çavuşlar katibi*) in the Imperial Council.[95] In Istanbul, petition writers generally sat in the streets close to the

92 Altınay, *Hicri On İkinci Asırda İstanbul Hayatı*, 207.

93 Necdet Sakaoğlu, "Arzuhalciler," in *Dünden Bugüne İstanbul Ansiklopedisi* (Istanbul: Tarih Vakfı Yayınları, 1993), 335–337. For a study concentrating mostly on petitioning and petition writers after the *Tanzimat*, see Gülden Sarıyıldız, *Sokak Yazıcıları. Osmanlılarda Arzuhaller ve Arzuhalciler* (Istanbul: Derlem Yayınları, 2010).

94 Sakaoğlu, "Arzuhalciler," 335.

95 Altınay, *Hicri On İkinci Asırda İstanbul Hayatı*, 207; Mehmet İpşirli, "Arzuhal," in *TDV İslam Ansiklopedisi* (Istanbul: TDV Yayınları, 1991). Sarıyıldız also reports a petition submitted to the Imperial Council by the chief of the petition writers in 1759, in which a complaint is made about the increase of petition writers who were not authorized by the Ottoman

Imperial Council or in the vicinity of mosques, shops, and coffeehouses where people could easily find them.[96] We have almost no information on petition writers in the provinces though there must certainly have been some, since provincial people sent petitions through messengers to the Imperial Council.[97] Considering that the jargon of the petitions was quite uniform, one can see that the knowledge of a petition writer in the provinces was no different from that of his colleagues in Istanbul. These petition writers might also have been retired scribes from the Imperial Council who had retired to their hometowns. There is always, of course, the possibility that scribes and the *kadı* might have used their legal knowledge and drafted people's petitions in exchange for a fee.

The crucial role of petition writers was also recognized by outside observers. At the beginning of the eighteenth century, Dimitrie Cantemir, Prince of Moldavia, who made frequent visits to Istanbul and was a close observer of the Ottoman administration, wrote about petitioning and petition writers thus:

> ... They [petitions] must be penned so concisely, though the cause be never for great or intricate, as not to fill up above half an octavo page, for the Vizir's resolution, and the consultations and the sentence of the Judges must be writ on the other part of the page. For this reason, it is not every *Turk*, though very learned in other respects, that can draw up an *Arzuhal*; but there are *Arzuhalchi*s appointed for that purpose, who keep their offices near the Vizir's court, and are always ready to be hired. Whoever has a cause to lay before the Vizir, applies to them, nay the very *Reis Effendi*, or High Chancellor of the Empire, though a very good scribe, does not venture to write an *arzuhal*, but sends an account of his cause to one of the *Arzuhalchi* to have it drawn up.[98]

The existence of such official and formal requirements in petition writing, which could only be fulfilled with professional assistance (as depicted by Cantemir in a slightly exaggerated manner), hinders us from understanding the

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administration; in the complaint they ask that those involved in this unofficial practice of petition writing be penalized. Sarıyıldız, *Sokak Yazıcıları*, 103.

96 Altınay, *Hicri On İkinci Asırda İstanbul Hayatı*, 207; Sarıyıldız, *Sokak Yazıcıları*, 115–125.

97 Peirce has documented two or three Aintabans who petitioned the imperial center in 1540–41 but they were among the elite of the province. She states that ordinary individuals tended to go to the governor-general because access to him was physically much easier. See, Peirce, *Morality Tales*, 124–125; Suraiya Faroqhi, "Crime, Women, and Wealth in the Eighteenth-Century Anatolian Countryside," in *Women in the Ottoman Empire, Middle Eastern Women in the Early Modern Era*, ed. Madeline C. Zilfi (Leiden, New York, and Cologne: Brill, 1997), 212–213; Faroqhi, "Political Activity among Ottoman Taxpayers," 2.

98 Cantemir, *The History of the Growth and Decay*, 316–317.

real motives behind petitioning the Imperial Council. The necessity of writing petitions in a deferential and officially authorized language and in conformity with formal requirements[99] impeded petitioners from expressing their complaints in informal terms outside the boundaries of legal language. Petitions and summaries of petitions in the imperial rescripts recorded in *Ahkam* registers present us mainly with what the authorities, including the petition writers as legal intermediaries, found essential to include in the narrative in terms of legal procedures. This creates an obstacle for the historian who uses such documents and hopes to hear the petitioner's voice "from below."

On the one hand, the formulaic structure of petitions is a methodological pitfall for the historian and limits the possibility of understanding the petitioner in the process. On the other hand, it provides interesting clues about the agency of petition writers and other actors in the petitioning process. Petitions reveal that petition writers were generally well-informed of the workings of the Imperial Council and guided the whole process, including the way in which the adjudication and execution should be carried out once the imperial order had been given. The final sentences of petitions generally include instruction-like requests as to whom the imperial order should be addressed ("An exalted order addressed to the Anatolian governor and the judge of Eğrigöz is kindly requested"),[100] how the case should be adjudicated ("for justice to be established in situ" or "heard in situ according to the imperial order"),[101] and even how the penalty should be carried out ("to be addressed to the Anatolian governor to collect [the fine] from them" or "through the imperial guard").[102] While this gives a great deal of professional authority to the petition writer, it also enables him to manipulate the legal process. In other words, the petitioner could manipulate the system if she found the right petitioner and made him write her petition in such a way that the legal solution was incorporated into the request for the benefit of the petitioner, albeit in official language.

In this regard, petitioning was first a "dialogic" process. Despite being written in specific legal terminology, the petition "manipulated, contested, and partially redefined official terms."[103] Indeed, deferential and officially authorized

99 Chalcraft, "Engaging the State," 7.

100 "Anadolu valisi ve Eğrigöz kadısına hitaben ferman-ı alileri rica olunur." BOA, A.DVN.ŞKT, folder 5, petition 11.

101 "…mahallinde ihkak-ı hak olunmak babında" (BOA, A.DVN.ŞKT, folder 5, petition 11) or "…ferman mucibince mahallinde görülmesi rica" (BOA, A.DVN.ŞKT, folder 57, petition 24).

102 "yedlerinden tahsil babında Anadolu valisine hitaben" (BOA, A.DVN.ŞKT, folder 67, petition 82) or "çavuş mübeşeretiyle" (BOA, A.DVN.ŞKT, folder 67, petition 16).

103 Chalcraft, "Engaging the State," 308.

language saved ordinary Ottoman subjects from being labeled as dissidents while allowing them to manipulate to their advantage certain terms like bandits (*eşkıya*), state officials (*ehl-i örf*) or formulas like "constant habit" (*adet-i müstemirre*) or "violation of honor" (*hetk-i ırz*), as I explain later in detail.[104] By using a repertoire of legal phrases, the state and the petitioners negotiated and redefined social terms such as honor and justice.

Second, the involvement of petition writers and other actors in petitioning process, as we see later, suggests that petitioning was in fact a collaborative project. It required a number of formulae, as well as legal and social networking. In order for the petitioner to initiate the process, she needed to have the necessary financial and social support. First, she needed to find and be able to afford the petition writer. Submitting the petition also required activating certain means; if she was from the province, as the examples in this study generally are, she would either find someone to send her petition or take the petition to Istanbul. Furthermore, if necessary, she would complete ancillary legal processes such as getting a *fetva* from the *şeyhülislam* or having her petition written down by the *kadı*. Hence, petitions give indicate a person's ability to collaborate both socially and legally, and perhaps tell us more about this than about the agency of the petitioner. In this regard, agency is treated as a collaborative act rather than a personal one in this study.

Another aspect of petitioning is the relatively important role of the written document. On the one hand, the physical presence of the petitioner in the Imperial Council and the presentation of an oral petition—even if a written petition was submitted—in comparison with sending the case through an intermediary would certainly make a difference. On the other hand, petitioning did not require that the testimony of the plaintiff be taken in the presence of the defendant as happened in most cases in the *kadı* court. The written document was legally sufficient as a petition to start the investigation. Fahmy even argues that the precedence of the written document over oral petitioning was the distinctive character of the *kanun* and *siyasa* sphere; "the *siyasa* evinces clear privilege given to the written over the spoken word."[105] Even though witness testimony and oath taking were more standard and common evidence in the *kadı* courts, one should not underestimate the power of the

104 In the next chapter I discuss how the term "bandit," in particular, created a dialogue between the Ottoman central government and Ottoman subjects in which the latter used this dialogue to their advantage to solve local disputes and criminalize certain people in the provinces.

105 Khaled Fahmy, *A Sense of History: Law and Medicine in Modern Egypt* (University of California Press, forthcoming).

written documents in the local courts as well, especially in property matters.[106] Nevertheless, petitioning involved a greater engagement with the written document, both for the Imperial Council and the petitioner.

The Imperial Council often had recourse to previous records in the registers and wrote down all the proceedings on the petition itself, as discussed earlier. The Ottoman central administration's practice of relying on written documents was adopted and strategically used by Ottoman subjects in turn.[107] First, petitioning itself was an influential use of the written document. Furthermore, bringing an imperial decree to the local court as a result of the petitioning process is also an example of the power of the written imperial document in the minds of some Ottoman subjects. Second, petitioners themselves referred to written documents, such as a tax exemptions given to their ancestors and recorded in provincial tax registers, documents concerning the will of the founder of a foundation (*waqf*), or even a "rescript of justice" sent by the central administration to their province. Sometimes to strengthen their claims they brought imperial rescripts that related to previous issues.[108] Even if some of these documents, including the imperial decree that was brought back to the local court, were not considered official evidence equal to the witness testimony in the *kadı* courts, the authoritative power of the written document produced by a state office, especially one such as the Imperial Council,

106 Peirce shows how "writing" and inscription became an act of possession for both the imperial state and its subjects during the process of imperialization in the sixteenth-century Ottoman Empire. She demonstrates that producing written documents was very common and strategically beneficial for the Aintabians who went before the court. Peirce, *Morality Tales*, 279–285. Nevertheless, the use of written documents for evidentiary purposes does not necessarily mean that they constituted proof in the legal processes in the courts. For example, Ergene argues that written documents were not used as evidentiary instruments whereas they were used for dispute resolution and in addition to other evidence in court proceedings in Kastamonu and Çankırı in the seventeenth and eighteenth centuries. Boğaç A. Ergene, "Evidence in Ottoman Courts: Oral and Written Documentation in Early-Modern Courts of Islamic Law," *Journal of the American Oriental Society* 124, no. 3 (2004), 477.

107 Faroqhi, "Political Activity among Ottoman Taxpayers," 7.

108 Ibid., 7–13. Also see cases in seventeenth-century Kayseri court records in which people brought the imperial order, *fetva*, and register page in question before the court, Ronald C. Jennings, "Limitations of the Judicial Powers of the Kadi in Seventeenth Century Ottoman Kayseri," *Studia Islamica* 50 (1979): 151–184; Jennings, *Studies on Ottoman Social History in the Sixteenth and Seventeenth Centuries: Women, Zimmis and Sharia Courts in Kayseri, Cyprus and Trabzon* (Istanbul: ISIS Press, 1999), 253–254.

which was superior to any of the *kadı* courts in the judicial hierarchy, cannot be denied as a litigation strategy.[109]

Yet, even more important than all this, petitioners and petition writers were well aware of the power of rhetoric. They knew that their petitions must attract the attention of Imperial Council personnel in order to be considered worthy of a hearing in the Imperial Council. The petition writer had virtually full authority in creating the rhetoric, crafting a plausible narrative—albeit within the limits of the official language—and was thus at the center of the petitioning activity. However, as Natalie Zemon Davis brilliantly shows in her study of letters of remission in sixteenth-century France, looking at the "fictional" aspects of these documents is not, inevitably, a "quest for fraud" or "forgery."[110] Rather, looking at how the narratives were formulated through this collaborative endeavor and seeing what kind of rhetorical strategies were employed gives us important clues about the moral and social sensibilities of Ottoman subjects. It is in this sense, rather than by taking the narratives created in the petitions at face value, that I explore the rhetorical value of petitions.

Last but not least, the historian must keep in mind the handicap of the "clinical fallacy"[111] of assuming that petitionary records are representative of petitioning as a whole. The cases recorded in the petitionary registers of imperial rescripts and the petitions considered worthy of being archived by Ottoman bureaucrats "tend to be either those that involve the most serious types of crimes, or those that were most complicated from a legal standpoint"[112] since they required sultanic intervention. We can never be sure if all the petitions submitted to the Imperial Council received a response and were recorded in the council registers. For example, some mundane issues, such as simple debt, loan, and property issues or travel requests are recorded in the registers but comprise a small number compared to criminal matters. Therefore, we do not know if the petitions that were regarded as less important by the Imperial Council were recorded in the registers. Rather the available petitions and the

109 For a detailed discussion of the use of written documents as secondary evidential instruments and as a litigation strategy, see Ergene, "Evidence in Ottoman Courts."

110 Davis, *Fiction in the Archives*, 3–4.

111 I borrowed this term from Linda Gordon who uses it in "Gender and History" seminars at New York University. It refers to the researcher's illusion of assuming that cases found in criminal, social work or medical records are representative of the general population. For its original use in psychiatry to refer to the clinician's illusion that arises from sampling problems in illnesses such as schizophrenia, see Patricia Cohen and Jacob Cohen, "The Clinician's Illusion," *Arch Gen Psychlatry* 41, no. 1 (1984).

112 Petrov, "Everyday Forms of Compliance," 735.

imperial rescripts reveal what was considered legally and socially important in a specific period.

Petitions as a Mirror of Local Cleavages

Despite the methodological pitfalls in examining petitions for historical analysis, they give us important clues about the functioning of different legal institutions in the Ottoman Empire and about the socio-legal and rhetorical strategies that Ottoman subjects and state authorities employed in legal processes. For example, petitions generally included reasons the petitioner wanted to send her case to the Imperial Council. Even if we cannot know the motivations of the petitioners, by examining the reasons given in the petition, we can try to understand the rhetorical strategies of the petitioner from this legal reasoning.

Many petitions explain their appeal to the Imperial Council as "not being able to hold out against them (the accused) at the local level."[113] In a variety of ways, the petitions express a "lack of power"—so to speak—of individuals fighting against certain power holders at the local level. For example, in a serious case in which a woman was kidnapped and murdered, we come across the issue of the "impossibility of hearing the case at the local level."

> May you, most excellent and merciful master, be well and strong!
>
> I, your humble slave, from the district of Uşak, was married (*akd ü tezvic*) to Alime bint Hacı İbrahim from Dirne neighborhood of the town of Birke, and brought her to my region [lit., country]. My wife's cousin (her uncle's son), Kara Mahmudoğlu, and his son-in-law from the inhabitants of Dirne allied with each other and brought my wife to their town by saying "your husband has come to town and called for you." Then they attacked my wife with the intention of an indecent act/rape (*fi'l-i şeni' kasdıyla*); my wife escaped from their hands, then her cousin fired a pistol at her back and Hacı İbrahim cut her head off and buried her right then. When the inhabitants of the town received the news, the *müftü efendi* exhumed her corpse, performed its ablution and buried it again. While I actually wanted to have a trial and establish justice with those men, somehow it has not been possible to prevail against them (*bir dürlü mukavemet mümkün olmayub*). They have also troubled me and Kara

113 "mezburlar ile mahallinde mukavemet idemeyeceğini izhar itmekle" in a case in which two men tortured a woman cruelly. BOA, Anadolu Ahkam Defteri 3, case 208 (Cemaziye'l-ahir 1156/June-July 1743). I analyze this case later in detail.

> Mahmudoğlu Hacı Mustafa even seized my wife's estate. Thus, I kindly request from my most excellent sultan an imperial decree ordering the rendering of justice according to *shari'a* through the appointment of an usher (*mübaşir*) [to supervise the trial].
>
> Your humble servant, Seyyid İbrahim[114]

Although the petitioner, Seyyid İbrahim, claimed to have wanted a court trial with the alleged rapists and murderers of his wife, he declared in his petition that "somehow it has not been possible to prevail against" them. Thus, he asked the Imperial Council to send an usher to watch and supervise the local court trial. He and the petition writer must have been well aware of the fact that the Imperial Council would forward the case back to the jurisdiction of Uşak. Thus, the petition did not ask for a trial in the Imperial Council, rather it asked for supervision of the local adjudication process.

The reasons Seyyid İbrahim was not able to stand against these men are not clear from the petition. It is likely that there was a family issue involved in Seyyid Ibrahim's marriage to Alime. The involvement of Alime's cousin in her kidnapping and murder may indicate such a problem. The fact that Seyyid Ibrahim explicitly mentioned in his petition that his marriage to Alime included a marriage contract (*akd ü tezvic eyledikde*) may also indicate that their marriage was a problem for Alime's family or others. Her cousin or one of the other men might have been a prior suitor. As a result, her cousin might have been sent by the family to kill her. Alternatively, the gang might have planned the kidnapping and rape to get revenge from her husband for an unwanted marriage, or create an adultery scenario and thus force him to divorce her.

Whatever the possible scenario, it is pretty clear from the tone of the document that Seyyid Ibrahim wanted to give the impression that he was unable to fight against these men at the local level. As explained in regard to the methodological pitfalls of petitions, from looking at the petition itself it is not easy to decipher either the network of the allied men mentioned in the petition or how powerful the two parties were in that locality.[115] However, one can still see that the accused men were powerful enough to kill Alime, seize her estate, and still create trouble for her husband, all in addition to committing rape and murder in violation of society and law. Yet, it is impossible to know if the petitioner was concerned about the local judicial authorities, i.e., the judge and the *ehl-i*

114 BOA, A. DVN. ŞKT, folder 2, petition 32 (1155/1742).

115 A micro-study of the region through a multi-dimensional inquiry of diverse documents is needed in order to decipher their social status and networks. Even if this is done, the chance of finding the same case in a petition and in the court records is very low.

örf who would execute a possible verdict and cooperate to his disadvantage, or if he feared that the local *kadı* was incapable of fighting against these powerful men.[116] The petitioner himself, by petitioning the Imperial Council through his material and social power, could have been involved in a plot to accomplish something else, for example, to wrest his wife's estate from the alleged party. However, by trying to get an usher appointed to supervise the case in the local court, the petitioner aimed to overcome any "resistance" by local power holders, perhaps including the local *kadı* and/or the executive authorities.

Yet, some petitions clearly indicate who they could not prevail against, or they explain why a local court trial could not be held in their case. For example, in a petition written in 1742, a certain Hüseyin, the father of a murdered son, complained about the extra-judicial cooperation between the military administrative authorities and the culprits. At first glance the case looks like a simple accusation of murder. However, the previous involvement of the petitioner's murdered son in an offense with a sexual connotation and the involvement of some state officials in his murder as part of an extra-judicial punishment make the case more complicated:

> May you, most excellent and merciful master, be well and strong!
>
> I, your humble slave, am from the town of Emed of the district of Eğrigöz. Hacı Ömer, Sirkeci Muradoğlu Hacı Hasan, and Kazlı from the aforementioned town allied with each other and argued that my son, Osman, cut the hair of the virgin daughter of the aforementioned Kazlı. They did not consent to a court trial, which I was ready to accept, and they let a group of administrative officials (*ehl-i örf taifesi*) capture and beat him to death. Since the aforementioned men committed an injustice and oppression by causing my son's death, I kindly request from the Sublime Porte an imperial decree addressing the governor of Anatolia and the judges of Eğrigöz and (Empty) to render justice *in situ* (*mahallinde ihkak-ı hak olunmak babında*) according to the *fetva* of the *şeyhülislam* that I have.
>
> Your humble servant, Hüseyin[117]

116 In fact, Ginio claims such references to the incapacity of the local court were mounted in the Salonican court records toward the middle of the eighteenth century. Yet, he also admits that it is not possible to quantify its occurrence or to argue that it is a new phenomenon. Ginio, "Coping with the State's Agents," 54.

117 BOA, A.DVN.ŞKT, folder 5, petition 11 (1156/1743).

The narration of the case in Hüseyin's petition clearly shows why Hüseyin wanted to apply to the Imperial Council. The petition claims that some people obeyed justice and others did not. According to the plot, Hüseyin was willing to abide by *justice* by having a court trial with the accused when they blamed his son for assaulting the virgin daughter[118] of one of them. However those men did not consent, and instead utilized *unjust* means by cooperating with "corrupt" administrative officials to beat his son to death. Thus, the petition claims that the matter at stake is not only the punishment of his son, but rather his murder because the death was carried out through extra-judicial means. According to legal procedures, the litigant(s) should have brought their allegation against Hüseyin's son to the local *kadı* court and the judge should have given a sentence. Only then could the administrators of the town—for example, the governor, police superintendent (*subaşı*), *voyvoda* or fief-holder (*zaim*)—carry out the sentence, i.e., inflict the penalty. From the sixteenth century onward, there was a certain division of labor between the *ehl-i şer* (religious legal authorities) and *ehl-i örf* (military-administrative authorities) regulated by imperial law (*kanun*) in the adjudication of (sentencing) and punishment of crimes in the Ottoman legal system.[119] This legal division of labor might have become a more sensitive issue for the central government when the boundaries between the identities of "bandits and bureaucrats"[120] became more blurred in the eighteenth century.[121] Our petitioner, Hüseyin, perhaps by guiding his petition writer (*arzuhalci*), seemed to be aware of such a division of labor between the adjudication and enforcement and for that reason he petitioned the Imperial Council directly, since the administrative authorities had bypassed the authority of the local judge and carried out an extra-judicial killing. Thus, the illegal execution of a sentence given by the *ehl-i örf* without a judgment

118 Although cutting someone's hair may not appear to be an assault (according to modern sensibilities), it was considered an assault to the bodily integrity of a person, especially when this person was a virgin girl. Assault by "pulling a woman's hair" was defined as a sexual crime in the law book of Selim I at the beginning of the sixteenth century. "Bir kişi avretin yoluna varub yahud evine girüb saçın çekse veya donun veya destarın alsa, ba'des-sübût muhtem ta'zir edüb dahi habs edüb Dergâ-ı mu'allâya arz edeler." Ahmet Akgündüz, *Osmanlı Kanunnameleri ve Hukuki Tahlilleri*, vol. 3 (Istanbul, Turkey: Fey Vakfı, 1991), 89–90.

119 Mehmet İpşirli, "Ehl-i Örf," in *TDV İslam Ansiklopedisi* (Istanbul: TDV Yayınları, 1994), 520; Peirce, *Morality Tales*, 122, 311–312.

120 I borrow this term from Barkey, *Bandits and Bureaucrats*.

121 I discuss in detail the blurring of boundaries between provincial families (*ayan*), state officials (*ehl-i örf*), and "bandits" (*eşkıya*) that resulted from the tax-farming policies of the Ottoman state after the seventeenth century.

from the *kadı* gave Hüseyin a legitimate reason to apply to the Imperial Council to redress the injustice.

Yet, by using the term *ehl-i örf* in the petition, the petition writer seems to have employed an indirect strategy rather than a literal accusation of the administrative officials. An interesting detail in the wording of the petition makes this clearer: While the petition identified by name and title the three men who had his son beaten and killed, it did not identify the *ehl-i örf* who "inflicted the punishment." In other words, Hüseyin did not directly accuse that "group of state officials" (*ehl-i örf taifesi*) of killing his son, but rather the three men who were associated with the *ehl-i örf*. The imperial decree written at the top of the petition itself does not give any idea about whether the men of *ehl-i örf* were also to be held responsible for the injustice and therefore be interrogated in the local court because the decree only says that "it was ordered according to *shari'a*." One can still argue that the petitioner wanted the state officials to be punished too, though he did not dare to pronounce their names openly in his petition, perhaps out of fear. The reason he asked for an imperial decree addressing the governor of Anatolia could relate to the jurisdiction of the provincial governor over the state officials.

In fact, governors and their men were the "usual suspects" at all times and their oppression of taxpaying Ottoman subjects (*reaya*) was recognized by the central government. On the one hand, people were suspicious of governors and anyone who established close relations with the governor's entourage because the latter held financial as well as military weapons in hand.[122] On the other hand, the oppression (*zulm*) and wrongdoing of state officials was the main subject of rescripts of justice and law books from earlier periods of Ottoman rule. Imperial Council officials who responded to petitions at least recognized this, though they did not always take effective measures to prevent it. Thus, the *ehl-i örf* was the "quintessential villain" for petitioners and for the central government—though the latter's recognition of the wrongdoing of the governors was not always a wholehearted one.[123] In this sense, the association

122 The *ehl-i örf* collected taxes from Ottoman subjects in the classical *timar* system; they constituted the main body of *mültezim*s (holders of tax-farming revenues) in the seventeenth and eighteenth centuries. They held the majority of the positions of military power and recruiting mercenaries. In relation to the latter, they were assigned the duty of inflicting punishment on criminals.

123 Faroqhi points out that presenting the ruler as constantly struggling against the abuses of his servitors and therefore as not taking part in the depredations of his officials was an age-old legitimizing device found as often in Western Europe as it was in the Ottoman central government (and by the *divan* scribes), at least during the late sixteenth and early seventeenth centuries. I have observed that the same device was still in use in the

of the three men identified in the petition with the unnamed *ehl-i örf* can be read as a strategy on Hüseyin's part to use the rhetoric, mutually recognized by the state and its subjects, of "unlawful *ehl-i örf*" in order to struggle against his local opponents. By using the term *ehl-i örf* with no clear reference, he might have been trying to show the central government that these three men had consolidated power by working with the state officials.

The petition also raises questions about if and/or why the petitioner did not apply to the local court before petitioning the Imperial Council. His comment that he was ready to have a court trial while his opponents did not consent[124] when they accused his son of assaulting the virgin girl implies that he did not seek justice with the court when his son was murdered. Furthermore, he requests a decree addressing the governor of Anatolia and the *kadı* of Eğrigöz (the judicial district his town was under the jurisdiction of) as well as most probably the *kadı* of Emed (his own town, suggested by the empty space in the petition); this indicates that the petition seeks the supervision of the local legal process by higher authorities, i.e., the governor of Anatolia and the provincial judge. Although these clues in the petition do not clarify if the petitioner was suspicious of the judge's cooperation with the administrative officials and therefore his bias against these three men, or if he believed that the local court was incompetent to fight against such a clique, it is pretty clear that he wants the supervision of his case by higher authorities. Eyal Ginio shows, with examples from eighteenth-century Ottoman Salonika, that the petitions deployed two arguments to revoke judicial revision: the incompetence of the local court either because of corrupt or weak judges, or illegal procedures, including those of other local administrators. In such cases, "if convinced, the sultan would issue a decree enjoining the transfer of the case hearing from the local court to another court that was situated in a bigger city placed higher in the judicial hierarchy."[125]

In Hüseyin's petition, the judge of Eğrigöz represents the higher authority in the judicial hierarchy, the one who was supposed to supervise the judge of Emed. It seems that someone wanted the case transferred to the jurisdiction of the Eğrigöz judge. Yet, the role of the governor of Anatolia is not still clear in this specific case. Since the petition asked for the case be held *in situ* and

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eighteenth century. For an inspiring and detailed discussion of the recognized lawlessness of the governors and their men and its rhetorical and factual forms deployed by petitioners and the central government, see Faroqhi, "Political Activity among Ottoman Taxpayers," 13–16.

124 "bu kulları şer'e razıyken mezburlar şer'i şerife razı olmayub."

125 Ginio, "Coping with the State's Agents," 49–55.

there is no specific request to hold court in the governor's council (*divan*), it seems unlikely that the governor would set a trial in the provincial center. Yet, since the governor was responsible for public order, especially against serious criminal acts like homicide, and covers the jurisdiction of the administrative-military officials in his domain, the petition might have asked for his supervision as well, probably by sending an usher to the court in Eğrigöz. Furthermore, if those who were involved in the murder were sentenced to punishment, it was the governor who would execute it.

Another strategy, beyond asking for the supervision of the case by a higher authority, involved obtaining a *fetva* from the office of the *şeyhülislam* before petitioning the Imperial Council. My research on petitions shows that obtaining a *fetva* from a mufti or, in general, from the *şeyhülislam* seems to have been a common practice for petitioners in this period. This may indicate a shared popular legal knowledge of the effect of a *fetva* in the petitioning process. People must have been directed to the *şeyhülislam* by the petition writers and those who had more knowledge of how the legal system worked in the Imperial Council. Once one has financial means, getting a *fetva* from the *şeyhülislam* does not seem to have been such a difficult task, as there were institutionalized means in place to obtain a *fetva*. The *fetvahane*, the department for the issuance of *fetva*s in the office of the chief mufti, who worked under the direction of his secretary (*fetva emini*), was already a well-established institution in the eighteenth century.[126] This bureaucratic structure not only made the application for a *fetva* by private parties a routine practice, but also enabled the office to issue an extremely large number of *fetva*s in one day.[127] Thanks to this legal bureaucracy, the *şeyhülislam* often wrote his reply without even reading the question since there were "ready-made" *fetva*s for most common matters. Moreover, the *şeyhülislam* sometimes even left the preparation of the replies/*fetva*s to his assistants.[128]

126 It was set up during the reign of Süleyman I in the sixteenth century. For more information on its workings, see Heyd, *Studies in Old Ottoman Criminal Law*, 46–9; Mehmet Zeki Pakalın, "Fetvahane," in *Osmanlı Tarih Deyimleri ve Terimleri Sözlüğü* (Istanbul: Milli Eğitim Bakanlığı Yayınları, 1993).

127 Hezarfen, a seventeenth-century Ottoman historian, reported that the *şeyhülislam* issued 300 to 400 *fetva*s twice a week while *şeyhülislam* Mehmed, in one of his letters, complained about issuing almost 200 *fetva*s on most days. Hezarfen Huseyn, *Telhis al-beyan fi qavanin-i Al-i Osman*, Bibl Nationale, MS Ancien fonds turc 40, fol. 137b and Süleymaniye Library, MS Şehit Ali Paşa 2865, 93–94, as quoted in Uriel Heyd, "Some Aspects of the Ottoman Fetva," *Bulletin of the School of Oriental and African Studies* 32, no. 1 (1969), 46. The famous *şeyhülislam* of Süleyman's reign, Ebussuud—as reported by his disciple—claimed to have once written 1,412 *fetva*s in a day. Ibid.

128 Ibid., 49.

It is clear that these legal opinions strengthened the petitioners' cases and claims. If petitions, as processed versions of reality, guided the Imperial Council toward what legal action should be taken and how the imperial decree should be written, as noted, then obtaining a *fetva* from the chief mufti was critical for the petitioner to gain control over and, as a result, direct the legal process. Research on court records documents that submitting *fetva*s had an influential effect on the litigation results.[129] Indeed, applying to the office of the chief mufti for a *fetva* was an essential part of the petitioning process; this might be the petitioners first acquaintance with the official face of the legal system, after having only a semi-official collaboration with the petition writer. The wording and framing of the question was very important to receiving a favorable answer. The petitioner might have learned how best to formalize the question through trial and error, by submitting the same question in different words more than once. Furthermore, the act of having a *fetva* symbolically showed the Imperial Council that the petitioner was aware of the legal processes and had been through the necessary legal steps, and would not keep the Imperial Council busy for nothing. Moreover, it also had a practical function: The petitioner manipulated the legal process by providing the legal opinion—in favor of her cause—to the office that was considered the most respected religious authority in the Ottoman Islamic hierarchy.

Finally, an imperial rescript registered in the Anatolian *Ahkam* register that summarizes a petition concerning a complaint from an administrative officer from Uşak reflects other aspects of petitioning.[130] It shows the interplay of the notion of honor, the injustice of local administrative authorities, local perceptions of justice, and how claims for the redress of justice could be made by petitioning the Imperial Council. It gives us important clues to understand the ways in which a man's honor was closely associated with his wife's honor, and how claims of honor against the injustices of state officials or of other power holders were specifically articulated in petitions in eighteenth-century Anatolia.

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129 Tucker, *In the House of the Law*; Aykan, *Rendre la justice à Amid*; Aykan, "Property between Life and Death: A Juridical Debate over the Property of a Missing Person (Gaib) in Eighteenth-Century Ottoman Amid," in *Justice, Statecraft and Law: A New Ottoman Legal History*, ed. Huri İslamoğlu and Safa Saraçoğlu (Syracuse, NY: Syracuse University Press, forthcoming); Gerber, *State, Society and Law in Islam*; Selma Zečević, "Missing Husbands, Waiting Wives, Bosnian Muftis: Fatwa Texts and the Interpretation of Gendered Presences and Absences in Late Ottoman Bosnia," in *Women in the Ottoman Balkans: Gender, Culture and History*, ed. Amila Buturović and İrvin Cemil Schick (London: I.B. Tauris, 2007); Tuğ, "Ottoman Women as Legal and Marital Subjects."

130 BOA, Anadolu Ahkam Defteri 3, case 626 (Şaban 1156/September 1743).

Although the case registered in September 1743 by the Anatolian *Ahkam* registers seems quite marginal in terms of whom the litigation was brought against, on closer inspection it reveals an interesting case of a local struggle against the injustices of a constable (*zabit*) from Uşak. According to the story, a certain Hacı Mustafa from a village of Uşak came and petitioned the Imperial Council about a quarrel between a constable, Hüseyin Ağa, and a group of people that included the petitioner's nephew. The quarrel started when the constable, Hüseyin Ağa, denounced Fatime (to the lieutenant-governor of Kütahya) because she was already promised to another suitor (*namzedli*)[131] when she married Mustafa, the petitioner's nephew, as the following imperial rescript describes:

> It is decreed to the lieutenant-governor of Kütahya and the judge of Uşak that,
>
> .... When the virgin girl, Fatime, was married to Mustafa, the nephew of the petitioner Hacı Mustafa, through a marriage contract and with her mother's permission according to the *shari'a*, a certain Hüseyin Ağa, the constable of the aforementioned village, reported to you, the lieutenant-governor, with the intention of extorting money (*celb-i mal kasdıyla*), [and said] that Fatime had been promised to another suitor (*namzedli*) before she married Mustafa. Then, the case was investigated in the court through an usher and [it was] reported to you that there was nothing to interfere in with regard to Fatime. However, when the aforementioned Hüseyin was not confined and continued to provoke you, the abovementioned Mustafa (the petitioner's nephew) and his fellow villagers, Hacı Ahmed, Ömer Halil, İbrahim Halil, Ramazan and—captured him in an unjust manner (*bi gayr-ı hak*), and chained him. The petitioner reported that Hüseyin Ağa was still imprisoned in your prison, and therefore being mistreated. Thus, an imperial order was written to release him from prison, make him pay back anything he extorted (from the assaulted

131 A *namzedli* (suitor or candidate, most probably a young man or minor), refers to the man that a girl was pledged to by her family when she was still a minor; that is, it means she had a fiancé. According to Peirce, the former (minor couple) was apparently distinguished from the latter (adult couple) in sixteenth-century Aintab court records. See, Peirce, *Morality Tales*, 131. However, I have not documented any difference, rather I have encountered the utilization of the term *namzed* for both cases in eighteenth-century court records of Ankara and Bursa. For examples, see Tuğ, "Ottoman Women as Legal and Marital Subjects," 368 and n. 49.

party), and to hinder you and others from intervening in the affairs of inhabitants of the aforementioned village.[132]

The seeming contradiction between the petitioner's complaint and the imperial order is interesting at first glance. The petition as narrated in the imperial rescript apparently complains about the unjust interventions of an administrative officer in his nephew's marriage. However, when the plot continues, it turns out that the accused, constable Hüseyin Ağa, was already imprisoned by the assaulted party and the imperial decree orders his release. Thus, it looks like the Imperial Council ordered something the petitioner did not initially ask for.

Yet, the imperial rescript also commands the lieutenant-governor to prevent any interventions of administrative officials, including himself, in the affairs of the village inhabitants. The importance of giving this command to the lieutenant-governor can be better understood from reading the beginning of the imperial rescript. In fact, the rescript starts by mentioning a previous imperial decree concerning the administrative status of the village concerned, although initially this does not seem to be connected with Hüseyin Ağa's attacks and his imprisonment. The previous imperial order indicates that interference by the *ehl-i örf* with the taxpaying subjects of the village was prohibited by the *kanun*, since this village was among the villages under the fiefdom of Abdullah, who was currently employed as *beylikçi* in the Imperial Council in Istanbul.[133] In such lands possessed by a central administrator, local administrators did not have, in theory, jurisdiction over the population.[134] Then, the imperial rescript summarizes the petition of Hacı Mustafa, who was an inhabitant of that particular village, and describes the case quoted above. After the description of the event, Hacı Mustafa's request and the imperial order to the lieutenant-governor and the judge were merged in the language of the imperial rescript. While on the one hand Hacı Mustafa's request that Hüseyin Ağa be released from prison was set down in the decree, and this includes mentioning that

132 BOA, Anadolu Ahkam Defteri 3, case 626 (Şaban 1156/September 1743).

133 "…mumaileyhin berat-ı alişanımla mutasarrıf olduğu icmallü zeamati kurası serbest olub ve bu makule zeamet karyeleri min külü'l-vucuh serbest olmağla rüsum-ı serbestiyesine ve zeameti kurası reayalarına ehl taifesi taraflarından müdahale ve taarruz olunmak mugayir-i kanun olduğundan gayri bundan akdem olvecihle müdahale olmamak babında men'-i külli ile men ve def olmuş iken…"

134 See, Abacı, *Bursa Şehri'nde Osmanlı Hukuku'nun Uygulanması*, 64–66. For controversies between local administrators and centrally appointed tax collectors in sixteenth-century Bursa, see Özer Ergenç, *16. Yüzyılın Sonlarında Bursa: Yerleşimi, Yönetimi, Ekonomik ve Sosyal Durumu Üzerine Bir Araştırma* (Ankara: Türk Tarih Kurumu Yayınları, 2006), 141–150.

the latter should compensate the opposing party for their losses, on the other hand, it repeats that such interventions by the lieutenant-governor and other *ehl-i örf* against the taxpaying subjects of the village was not allowed and concludes the imperial rescript with a general order resembling an *adaletname*.

Thus, the petition was in fact a complaint about the illegal interventions and extortion of money by Hüseyin Ağa from Fatime's husband. By claiming that Fatime already had a *namzedli* when she married the petitioner's nephew, Hüseyin Ağa apparently gave him the right to claim a fine,[135] by reporting the case to the lieutenant-governor. Even if Hüseyin Ağa's claim was investigated and declined by the *kadı*, he continued to "provoke" the lieutenant-governor. Here, we see language implying a network of unjust collaboration between the local administrators, i.e, the constable Hüseyin Ağa and the lieutenant-governor, against certain men in that village. Furthermore, since the village was the fiefdom of a central administrator in Istanbul, they did not have the right to intervene even if Hüseyin Ağa was correct in his claim. In return, we see a local redress of justice, again through illegal means. The assaulted party captured Hüseyin Ağa and incarcerated him, probably by force, in the lieutenant-governor's prison. Yet, at the same time they apparently thought that they could not cope with this clique of the *ehl-i örf*, which probably included the lieutenant-governor, and therefore they asked a relatively neutral person, that is, the uncle of Fatime's husband, to petition the Imperial Council to seek a resolution to the dispute. As a result, the imperial decree ordered the lieutenant-governor not to intervene in any affairs of the subjects of that particular village and asked that Hüseyin Ağa be released and pay back whatever he took from the other party.

135 There was a customary marriage tax called the bride tax (*gerdek resmi* or *arus resmi*) which was collected by the provincial administrative officials, including the provincial governor (*sancakbeyi*), for each marriage. For a more detailed explanation of the bride tax, see, İnalcık, "Adaletname," 84–85; B. Lewis, "Arus Resmi," in *Encyclopaedia of Islam, Second Edition*, ed. P. Bearman, et al. (Brill Online, 2008). However, it is not clear if Hüseyin Ağa could claim a bride tax from Fatime's new husband, as there was already an existing suitor (*namzed*). Peirce explains that, according to sixteenth-century Aintab court records, disputes arose among families over the money exchanged at the time of the pledge if the prospective marriage did not take place. These payments were usually made to the girl's father by her future father-in-law. Peirce, *Morality Tales*, 131. In this case, Hüseyin Ağa might have intervened to collect the sum on behalf of the family of the pledged husband. There is also the possibility that he might have asked for a criminal fine (*cürm*), which local administrative officials were entitled to in the event that a crime (in this case pledging marriage to one man while being married to another) took place.

In other words, warning the lieutenant-governor as the head of the *ehl-i örf* was the "punch line"[136] for the entire case of Hüseyin Ağa—both for the petitioner and the central government. In requesting Hüseyin Ağa's release from prison, the petitioner Hacı Mustafa was indeed making a claim for a redress of justice by appealing to the central government. Similarly, the imperial decree acknowledged this larger claim by sandwiching the actual story of the constable between previous and current decrees that concerned the interventions of the *ehl-i örf*. Furthermore, it also acknowledged the local power equilibrium by not punishing anyone—it did not punish the accused party for imprisoning the constable in an illegal way, nor did it punish the constable for assaulting Fatime and her husband. Thus, the Imperial Council maintained the status quo by ensuring that Hüseyin Ağa would return the fee he received and that the local *ehl-i örf* would not interfere in issues concerning public order and financial matters.

Finally, the question remains as to whether or not any complaints against certain judges or deputy-judges (*naib*s) were sent to the Imperial Council. Although I did not encounter any petition that explicitly voiced a complaint against a judge's decision in court, the cases explained above give us clues related to petitioners' suspicions about the corruption of local *kadı*s, or at least their reluctance to adjudicate cases involving local power holders. In most cases, the petitioners asked for the adjudication or re-adjudication of their cases by a higher legal authority anyway. Furthermore, in the documents we read about a number of general complaints against certain *kadı*s and *naib*s. For example, there is a petition[137] by the inhabitants of Sandıklı who complained about the general wrongdoings of a deputy-judge appointed by the fief-holder. The community required an imperial decree ordering the fief-holder *efendi* to change the deputy-judge. We know that many judges, like those in Bursa and Ankara, were deputy-judges (*naib*s) appointed by high level magistrates who held high-ranking judicial districts as a revenue source (*arpalık*), during the eighteenth century.[138] As in the example above, people sometimes had

136 See n. 67 for "punch line."

137 BOA, A.DVN.ŞKT, folder 3, case 78 (1155/1742).

138 *Arpalık*, literally barley money, is "an allowance made to the principal civil, military and religious officers of state, either in addition to their salary when in office, or as a pension on retirement, or as an indemnity for unemployment." From the eighteenth century onwards, only the principal religious authorities could benefit by the grant of *arpalık*. R. Mantran, "Arpalık," in *Encyclopaedia of Islam, Second Edition*, ed. Th. Bianquis P. Bearman, C.E. Bosworth, E. van Donzel, W.P. Heinrichs (Brill Online, 2012). This practice of additional revenue allocation apparently turned into the granting of a territory, administration of which was also given to the recipient of the revenue. In the seventeenth and

problems with these deputy-judges because they were mostly selected from the local *ulema* and therefore had potentially more power and local connections than the judges appointed from the center.

There were also complaints against some *kadı*s and *naib*s who did not stay within the geographical limits of their jurisdiction and/or collected extra fines and taxes from the community.[139] The administrative authorities, and the judges tried to maximize their material interests by collecting extra fees for judicial transactions. Akdağ and Faroqhi state that *kadı*s acted no more uprightly than the *ehl-i örf* when they acted as tax collectors or collected fines such as *resm-i kısmet*, which they had the right to collect themselves.[140] As Coşgel, Ergene, Etkes, and Miceli explain in their detailed analysis of different Ottoman court records, the collection of fines in legal processes was increasingly subject to corruption, especially when inflation increased, political and administrative control was localized, and lifelong tax farming was instituted during the seventeenth and eighteenth centuries. Therefore, judges who stayed in their positions for shorter periods compared to the other local authorities either were not able to "limit the predatory activities within these strongholds or to rectify the crimes of provincial authorities," or in fact they "assisted the illegal or illegitimate activities of local authorities."[141] Thus, it would certainly be naive to assume that people did not have major problems with their *kadı*s and *naib*s.

Yet, court records and petitions which were written by local courts are biased in their reflection of people's complaints about *kadı*s and *naib*s, since the latter were involved in their production.[142] However, judges were still less powerful in the sense that they, compared to the *ehl-i örf*, did not have executive

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eighteenth centuries jurisdictional districts were appointed as *arpalık* to high-ranking *ulema* who mostly carried out the juridical administration of those districts by appointing *naib*s. See, Christoph K. Neumann, "Arpalık," in *Encyclopaedia of Islam, Three*, ed. Gudrun Krämer Kate Fleet, Denis Matringe, John Nawas, Everett Rowson (Brill Online, 2010).

139 BOA, Cevdet Adliye 2067, Anadolu Ahkam Defteri 3, case 337, Anadolu Ahkam Defteri 1, case 72. Ergene also cites a couple of cases documenting "corruption" of *kadı*s and *naib*s in Kastamonu and Çankırı court records of the eighteenth century. See, Ergene, *Local Court, Provincial Society, and Justice*, 47.

140 Mustafa Akdağ, *Türk Halkının Dirlik ve Düzenlik Kavgası: Celali İsyanları* (Ankara: Bilgi Yayınevi, 1975), 95, 252; Faroqhi, "Political Activity among Ottoman Taxpayers," 25–26.

141 Coşgel et al., "Crime and Punishment," 370–371.

142 This bias has been emphasized by many scholars. See ibid., 98–124; Faroqhi, "Political Activity among Ottoman Taxpayers," 24–25.

power, or the power to enforce their decisions on the population.[143] Furthermore, the *ehl-i örf* was composed of local gentry and the administrative class who, from the seventeenth century onwards, were better established locally as a result of lifelong tax-farming policies and the selling of offices by contract, as explained earlier.[144] For the same reason, people had more serious issues with the deputy-judges (*naib*s) who were generally chosen from among the local *ulema* families to substitute for the appointed *kadı*.

In conclusion, Ottoman subjects who had difficulties holding or bringing cases against strong local figures appealed to the Imperial Council to ensure that their case gained a hearing. In return, in most of these cases the central government activated a judicial review mechanism by either forwarding the case to a higher court or by appointing an agent to supervise the local trial. The higher court was either the adjacent court of a *kadı* higher in the judicial hierarchy, which was mostly supervised through an agent of the governor, or the case was heard directly by the governor's *divan*, with the assistance of a provincial *kadı* or finally, albeit rarely, the Imperial Council itself. The *kadı*s reluctance to adjudicate cases involving local administrators and/or other power holders, extra-judicial operations, the enforcement of punishments, and illegal cooperation with the *ehl-i örf* appear to be the most common reasons the Imperial Council accepted to adjudicate a case first, when there had not been a previous local trial.[145] The petitions and imperial rescripts analyzed in this chapter give us clues about people's suspicions of the *kadı*s' reluctance to adjudicate their cases, albeit these are not explicitly articulated. Further research is needed to see if and how often Ottoman subjects applied to the Imperial Council for revisions of previous court trials. In any case, the central government's involvement—initiated by petitioners—mostly served to galvanize the provincial, though rarely also the central authorities, to break either the "resistance" of local power holders against legal processes and/or the unjust coalition of local administrators and specific local parties.

This chapter also explores alternative scenarios behind the motivations of Ottoman subjects' and their "forum-shopping" in taking the legal action of petitioning; at the same time, we acknowledge that it is impossible to read the "real" motivation behind a legal text and action. By attempting to understand

143 The legal competence of *kadı*s in the eighteenth-century Ottoman Empire will be discussed in Chapter 5.

144 Salzmann, *Tocqueville in the Ottoman Empire*, 151–162.

145 The preliminary observations of Mehmet Akman, who has worked on criminal justice in the Ottoman Empire, confirm this view. See, Akman, *Osmanlı Devleti'nde Ceza Yargılaması*.

the "punch-line" and thus the plot of the legal text, I try to interpret the probable motivations, strategies, and rhetorical tools of the petitioners and the other actors, including the Imperial Council, involved in the production of these legal texts. In the dialogic process of petitioning, Ottoman subjects activated certain rhetorical strategies, such as the symbolic meaning of the *ehl-i örf* and, more importantly, sexual assault in order to refer to the wrongdoings of the plaintiffs. In this chapter I also argue that the central government used petitions as a surveillance technique to monitor the provinces. In the next chapter I explore this surveillance technique and the pivotal role of sexuality in more detail, particularly as it relates to provincial violence and banditry in eighteenth-century Anatolia.

CHAPTER 3

Banditry, Sexual Violence, and Honor

The history of eighteenth-century Anatolia is full of memories and practices of the violence of "bandits" and rebels. The sensibilities of the central government to the local events in the provinces during the eighteenth century were clear. The boundaries between categories of bandits (*eşkıya*), local notables (*ayan*), and military-administrative officials (*ehl-i örf*) became blurred as the Ottoman state approached the eighteenth century. At a time when the state was concerned about the rise of strong provincial ruling families and "banditry," Ottoman court records, imperial decrees, and petitions to the Imperial Council in eighteenth-century Anatolia vividly reflect this bitter struggle over violence.[1]

My research on sexual offense cases in eighteenth-century Ottoman Imperial Council registers of Anatolia (Anadolu *Ahkam Defterleri*) and petitions reveals two interesting phenomena: First, there were many more petitions and imperial decrees relating to sexual offenses than I had expected to find since my assumption was that the central government would not bother itself with the ordinary sexual crimes of Ottoman subjects. Second, there was an abundance of complaints by Ottoman subjects against the violence of certain "bandits" in local towns in Anatolia. These petitions and the imperial decrees mention not only generic types of violence associated with banditry, such as

1 Scholars have highlighted the main reasons for such widespread disturbances and disobedience in society as the decades-long warfare along the Ottoman boundaries, which left Anatolia relatively out of control; the deterioration in the economic stability of the empire; the arming of the peasants (*sekban*), which resulted from the Ottoman state's need for paid musketeers; and the peasants' participation in the unrest of semi-official tax-collecting bandit chiefs in the late sixteenth and the seventeenth centuries. Even though the first half of the eighteenth century was economically more stable than that of previous periods, the expanding networks of provincial notables did not stop the threat of brigands and bandits to the imperial government. For seminal works on the bandit phenomenon in Ottoman lands, see W. J Griswold, "Djalali," in *Encyclopaedia of Islam, Second Edition*, ed. P. Bearman, et al. (Brill Online, 2008); Mustafa Akdağ, *Celali İsyanları (1550–1603)* (Ankara: Ankara Üniversitesi, Dil ve Tarih-Coğrafya Fakültesi, 1963); Barkey, *Bandits and Bureaucrats*. As for the new approaches to the epidemic violence in Anatolia and Rumelia in the long Ottoman history from the sixteenth century to the nineteenth century, see Peirce, "Abduction with (Dis)Honor"; Oktay Özel, "The Reign of Violence: The Celalis c. 1550–1700," in *The Ottoman World*, ed. Christine Woodhead (London: Routledge, 2012), and three special issues (no. 33, 34, and 35) of *Kebikeç* on "bandit, celali and rebel" (*şâkî, celâlî, âsî*) published in 2012–13.

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plundering crops, attacking houses, and killing innocent people, but also, and almost without exception, incidents concerning sexual violence. The juxtaposition of these two issues, that is, the central government's surprising interest in sexual crime and petitions specifically mentioning the sexual violence of bandits (along with other crimes), is crucial to our understanding of the symbolic meaning of other contemporary forms of violence that accompanied sexual violence.

The abundance of imperial rescripts written in response to petitions against bandits can be explained by the two-way interaction and subtle strategic cooperation between the central state and Ottoman subjects in the petitioning process, as indicated in the previous chapter. Petitioners and their petition writers (*arzuhalci*s), with a social memory of banditry from the previous Celali rebellions[2] and, most probably, from contemporary local examples as well, were well-aware of the central government's concerns and sensibilities about "banditry" and local notable families that resulted from the shift in power and economic distribution which took place from the seventeenth century onwards. In reality, it was peasants and ordinary taxpaying subjects that often suffered most from excessive tax collection by various agents and from the collective violence of the "brigands" and "bandits" that increased during times of economic disturbances and power shifts.[3]

Thus, Ottoman subjects used phrases and terms corresponding to brigands and bandits, such as *mütegallibeden* (one of the usurpers), *şaki* (brigand, bandit, highway robber), and *eşkıya taifesinden* (a member of a gang of bandits) in

2 "Celali rebellions" is a general term used to describe the rebellions led by "companies of brigands, usually by idle or dissident Ottoman army officers, widely-spread throughout Anatolia from about 999/1590 and diminishing by 1030/1620," though they continued during the rest of the seventeenth century as well. Griswold, "Djalali." For a critique of the use of the all-compassing term *celali* through a well-founded discussion of the complex social, military, and political dynamics that resist categorization of the multiple activities of brigands, bandits, soldier-brigands, peasants, and local notables under the umbrella of *celali*s, see Özel, "The Reign of Violence."

3 The uncontrollable population of semi-nomadic Turcoman tribes in western and southern Anatolia and Kurdish and Arab tribes in southeastern Anatolia and northern Syria threatened the sedentary population in terms of highway robbery, raiding, and rampage. Özel, "The Reign of Violence," 187. It was important for those semi-nomadic tribes to be recruited as mercenary troops in order to be exempt from taxes and to gain in prestige. As a result, this "tribal" banditry was epidemic in Anatolia in the seventeenth and the eighteenth centuries. Muhsin Soyudoğan, "Devlet-Eşkıya İlişkileri Bağlamında Ayntab ve Çevresinde Aşiret Eşkıyalığı," *Kebikeç*, no. 21 (2006); Onur Usta, "Celâliliğin Türkmen Cephesi: 17. Yüzyıl Anadolu Kırsalında Türkmen Voyvodası ve Türkmenler," *Kebikeç*, no. 33 (2012).

an inflated manner in their petitions. In many cases these terms and phrases were used not to refer to a certain or fixed group of people identified as bandits in that locality, but as a sort of generic term to emphasize the "outlaw" or "criminal" character of the accused. At the same time, the central government must have known that it would lose its legitimacy and those petitioners would easily become actors in this collective violence against the state if their claims for protection were not at least heard. Thus, the imperial state also claimed that it was protecting the honor of its subjects from alternative sources of power that also threatened the honor of the state by assaulting its "private" subjects.

Sexual Violence as a Sign of "Habituation" to Violence

> May you, most excellent and merciful master, be well and strong!
>
> I, your humble slave, am an inhabitant of the village of Yıldırım elviran of the district of Şorba in Ankara. While my wife Fatime was taking care of her land without harming or offending anyone, Hacıoğlu Kadri, an inhabitant of the same village, being one among the harmful bandits, "broke into my house" at night and committed an "indecent act" (*fi'l-i şeni'*) with my wife and "violated (her/our) honor" (*hetk-i ırz*) and committed "mischief" (*fesad*). Since the aforementioned Kadri has run away, I kindly request your imperial order addressed to the judges of Ankara and Şorba and the governor of Ankara to resolve the case when he is captured and establish justice according to the *fetva* of the chief mufti that I present here.
>
> Your humble servant, Karabaşoğlu Hasan Beşe[4]

Although the couple's experience of the event and their sorrow were of course singular, the description of the case in the petition was not unique. (See Figure 3.1) A host of legal documents, including petitions, imperial decrees, and court records describe other events in mid-eighteenth-century Anatolia in almost exactly the same way the above petition describes the sexual assault on Fatime. Certain legal terms like "indecent act" (*fi'l-i şeni'*), "violation of honor" (*hetk-i ırz*) or expressions like "breaking into the house" were repeated to describe situations of sexual assault. Furthermore, those who committed sexual assault were generally identified as bandits or brigands with the use of a certain terminology such

4 Prime Ministry Archive, A.DVN.ŞKT, folder 67, petition 134 (1157/1744).

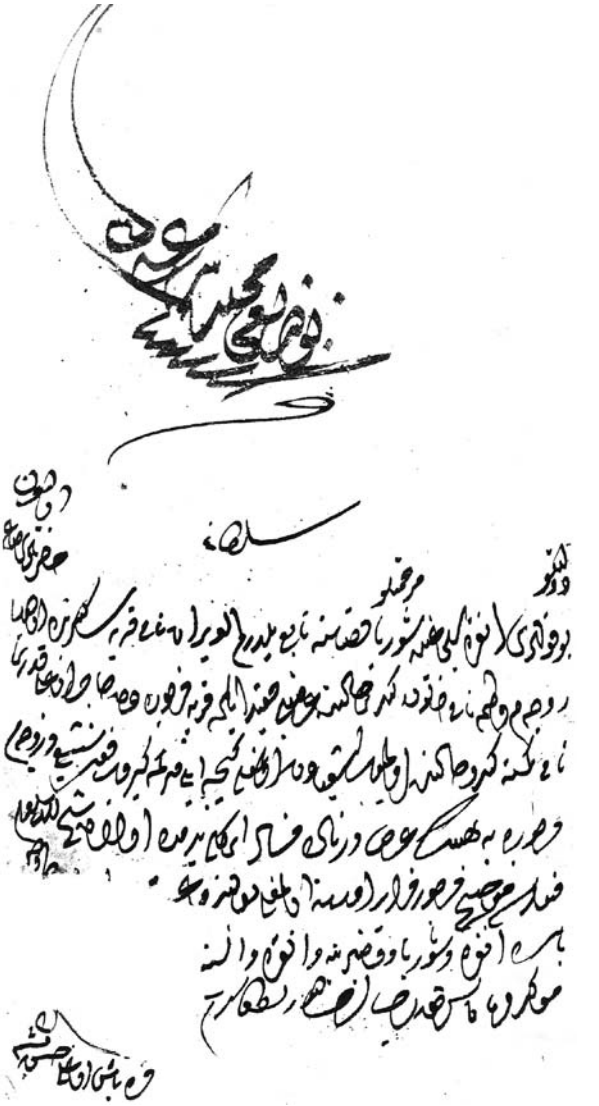

FIGURE 3.1 *The petition of Karabaşoğlu Hasan on the sexual assault against his wife, Fatime.* PRIME MINISTRY ARCHIVES. A.DVN. ŞKT. FOLDER 67, PETITION 134 (1157/1744).

as *mütegallibeden* (one of the usurpers), *şaki* (robber), and *eşkıya taifesinden* (a member of a gang of bandits), or *sa'i bi'l-fesad* (fomenter of mischief).[5]

The documents' use of terminology corresponding to "banditry" refers more to the sensibilities of the state and its subjects, and its strategic utility for both parties than it does about the perpetrators of this violence. The central government's sensibilities to the local events in the provinces during the eighteenth century were clear. The boundaries between categories of bandits (*eşkıya*), local notables (*ayan*), and military-administrative officials (*ehl-i örf*) became blurred toward the end of the seventeenth century, as other researchers working on seventeenth- and eighteenth-century local notables in diverse parts of the empire have shown. From the sixteenth century onward the development of local notables' is well known: they obtained tax-farms in Anatolia, established close cooperation and associations with military officials and the center, then gradually acquired small administrative posts, first as magistrates (*subaşı*) or deputy tax collectors (*muhassıl vekili*), and later in more important offices, such as deputy governor, deputy judge, etc.[6] In other words, they became the government and *ehl-i örf* in that locale.

Ultimately, the boundaries between "bandits" and "bureaucrats" were very fragile and flexible. One could easily be identified as a "bandit" one day and *ehl-i örf* the next, all as a result of negotiations with the central government. Karen Barkey's seminal work on state/bandit relationships in the seventeenth century shows that the central government in fact "created" bandit/mercenaries by enlisting the peasants and their leaders as important power holders in their provinces, and later, during the seventeenth century, incorporating them into the administration by bargain/recruitment.[7] On the other hand, it was also very easy to go from being a governor to a rebel in the eyes of the central government, as happened to Caniklizade Ali Paşa and the Caniklizade family during their struggle with the Çapanoğlu family in the Black Sea region in the

5 In the 1630–31 register of important affairs (*Mühimme* Defteri), Peirce observes that there is a rich repertoire describing defiance and insubordination in the correspondence between Istanbul and the provinces. Peirce, "Abduction with (Dis)Honor," 321.

6 Hülya Canbakal, "Ayntab at the End of the Seventeenth-Century: A Study of Notables and Urban Politics" (PhD diss., Harvard, 1999), 188–189. For a more nuanced analysis of local notables in Ayntab, see her book, Canbakal, *Society and Politics in an Ottoman Town*.

7 Barkey, *Bandits and Bureaucrats*, 235–237. While acknowledging Barkey's revisionist efforts and interpretation of such negotiations as another form of "state consolidation" rather than a "decline" and "decentralization," I do agree with Piterberg in his critique of Barkey's approach, which gives omnipotent agency and intentionality to the "state" in its incorporation techniques and therefore insists on maintaining a binary of "bandits" and "bureaucrats," as if they were coherent units. See Piterberg, *An Ottoman Tragedy*, 60–61.

eighteenth century. When the war ended and the central government no longer had an interest in utilizing the Caniklizade family in the Ottoman-Russian war, Ali Paşa was easily declared a rebel.[8] Furthermore, better employment opportunities offered by rival factions could bring about a shift in the loyalties of paramilitary contingents whose mercenary soldiery became a "commodity" during this age of monetization of the army. Thus, for example, auxiliary soldiers who served El-hac Mustafa Paşa and defended Belgrade against Kara Feyzi's insurgency in 1795 were controlled (through ongoing payments from their pasha) and persuaded not to join Kara Feyzi's bands. A more lucrative deal or the ill-treatment of their superiors could easily challenge the boundaries between the military forces and the bands of bandits.[9] As in many other examples, the infamous Kara Feyzi was co-opted as a respected "bureaucrat" in 1805 and incorporated into the struggle against the early "national" insurgencies in the Balkans.[10]

The petitions of the ordinary Ottoman subjects against "bandits" and the imperial rescripts written in response to these petitions also reveal the flexible usage of the terms "bandits" and "brigands"—as well as of the term, *ehl-i örf* (as revealed in the previous chapter) to designate and maneuver within local power struggles. In this sense, to differentiate between real and nominal bandits or small-scale robbers and important rebellious notables is futile in situations in which the sources at hand—petitions and imperial rescripts—do not differentiate, but use generic terms corresponding to brigandage to stigmatize as an outlaw anyone involved in mischief (*fesad*).[11] Yet, researchers should, of course, be careful not to adopt the central government's position or the rhetoric of the complaints in making complex distinctions between the socially mixed groups behind the term "banditry."[12]

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8 Canay Şahin, "The Rise and Fall of an Ayân Family in Eighteenth Century Anatolia: The Caniklizâdes (1737–1808)" (PhD diss., Bilkent University, 2003).

9 Esmer, "The Precarious Intimacy of Honor," 6.

10 Esmer, "Economies of Violence," 195.

11 Suraiya Faroqhi, "Räuber, Rebellen und Obrigkeit im osmanischen Anatolien," in *Coping with the State: Political Conflict and Crime in the Ottoman Empire, 1550–1720* (Istanbul: Isis Press, 1995), 163–164, as quoted in Işık Tamdoğan, "Le nezir ou les relations des bandits et des nomades avec l'état dans la Çukurova du XVIIIe siècle," in *Sociétés rurales ottomanes/ Ottoman Rural Societies*, ed. Mohammad Afifi, et al. (Cairo: Institut Français d'Archéologie Orientale, 2005), 260, 266.

12 For an important warning about the necessity of differentiating the "large, explosive pool of undifferentiated peasants (and nomads)" from the *celali* leaders and the importance of not seeing them merely in terms of intra-elite or imperial power conflicts by adopting the state's terminology of "banditry," see Özel, "The Reign of Violence," 196–199. For a careful

In numerous petitions and imperial decrees, "banditry" was, in one way or another, associated with sexual violence. For example, an imperial decree[13] addressed to the Kütahya lieutenant-governor (*mütesellim*) and the judge of Gördüs is concerned not with a power struggle between two important local power holders, but over the issue of an abduction. Es-Seyyid İsmail, who was described as a member of the religious nobles (*sadat-ı kuram*),[14] wrote a petition about a certain Mahmud Çavuşoğlu Ali who kidnapped his "virgin" wife and married her himself. The category of the "virgin wife" likely referred to that of a minor girl married by her legal guardians, on condition that the marriage was not consummated until she reached puberty.[15] In this sense, the legal document at hand defines the abduction case as "marriage over marriage." Such customarily common instances of abduction were criminalized and penalized by discretionary punishment under the *kanun* articles as well as by the *fetva*s of the *şeyhülislam*s in early-modern Ottoman legal culture, as I discuss later in more detail.

Yet, the document emphasizes the "banditry" of the accused by describing the habitual character of his criminal offense in a formulaic way, saying, "he was known to be the member of a gang of bandits who regularly gathered a hundred brigands together and was accustomed to violating people's honor."[16] Thus, on the one hand, his abduction of İsmail's wife was an indication of the

analysis of the networking and recruitment strategies of such a bandit through a constellation of different sources, see Esmer, "Economies of Violence."

13 BOA, Anadolu Ahkam Defteri 3, case 494 (Receb 1156/August 1743).

14 *Seyyid* (pl. *sadat*) is a descendant of the Prophet Muhammad. For the seyyidization of the local notables, i.e., the acquisition of the aristocratic prestige of the Prophet's pedigree, and entry into the official ruling class in the Anatolian lands in the early-modern period, see Canbakal, *Society and Politics in an Ottoman Town*, 77–83.

15 Islamic law gave a woman the right to annul a marriage when she reached legal majority—that is, puberty (becoming *baliğ*); she could do this by asking the *kadı* for an annulment if her legal guardian had made a marriage contract without her consent while she was a minor. See Tuğ, "Ottoman Women as Legal and Marital Subjects," 366–369; Mahmoud Yazbak, "Minor Marriages and Khiyar al-Bulugh in Ottoman Palestine: A Note on Women's Strategies in a Patriarchal Society," *Islamic Law and Society* 9 (2002); Judith E. Tucker, *Women, Family, and Gender in Islamic Law* (New York: Cambridge University Press, 2008), 42–43, 61; Tucker, *In the House of the Law*, 46–48.

16 "…mütegallibeden Mahmud Çavuşoğlu dimeğle maruf Ali nam kimesne kendü halinde olmayub ve hevasına tabi yüz nefer eşkiyayı başına cem … ve hetk-i ırz adet-i müstemirresi olmakdan…." Leslie Peirce points out that the registers generally state the size of a band of brigands, and forty may be a trope for a good-sized band. See Peirce, "Abduction with (Dis)Honor," 311–329, n. 21. Thus, collecting a hundred brigands is a good indication of being a powerful bandit leader.

extent of his violence, to the degree that he transgressed gender norms. On the other hand, the document "proves" his banditry by emphasizing the habitual, therefore not exceptional or individual, character of the sexual assault. So, sexual violence and banditry, which went hand-in-hand, were two crucial components of the accusation.

Ottoman court records, imperial decrees, and the petitions of Ottoman subjects addressed to the Imperial Council employed two terms to express the "excessiveness" of certain crimes and thus their destructive potential to the social order: first, these were constant habits (*adet-i müstemirre*) and second, he was a fomenter of corruption/mischief (*sa'i bi'l-fesad*). In order to emphasize the seriousness of the crimes of sexual violence such as abduction and rape, breaking into houses, doing serious bodily harm, theft and murder, the documents mention that such offenses were the "constant habit" of the offenders, who were in fact "fomenters of corruption." In the previous petition, Mahmud Çavuşoğlu Ali, the abductor, was defined by the petitioner as "accustomed to violating people's honor" (*hetk-i ırz adet-i müstemirresi olmakdan*). In another petition written to the Imperial Council by the husband of Ayşe, who was sexually assaulted by Ömer bin İbrahim, the accused was described as the one "who had been known for his cruelty and had a constant habit of exercising all sorts of oppression and transgression."[17] We should note that such phrases were part of a legal repertoire that was not only employed by Ottoman administrators but also by ordinary subjects, as in this petition, in order to negotiate, manipulate, and redefine social power struggles.

The court records of the community's testimony about the reputation of the accused also include expressions about the habitual nature of the crime. For example, the inhabitants of the neighborhood of Kavaklı in Bursa testified against Ahmed bin İsmail, who entered another man's house with the help of his (the burglar's) own mother, and stole some of that man's property. When the notables and learned people of the community were asked about his character, they testified to his bad reputation by stating that "he has the habit of stealing others' properties, attacking others' families, and [doing] other sorts of mischief."[18] Similarly, in a letter written by the *kadı* of Bursa to the local janissary officer requesting execution of the penalty on two men, "bandits," who had raided a bakery and committed sodomy there with a certain Abdullah, the judge gave the verdict with reference to the testimony of nine people

17 "öteden beri zulm ile maruf ve iyallerine (?) dürlü dürlü zulm ve ta'addi itmek adet-i müstemirresi olduğundan," BOA, A.DVN.ŞKT, folder 67, petition 43 (1157/1744).

18 "….mezbur Ahmed serika ve müsliminin iyallerine taarruzu ve o misillu fesadat adet-i müstemirresidir…," BCR, B166, 40B/1 (Cemaziye'l-ahir 1154/August 1741).

who declared that they had witnessed that "such mischief and corruption have always been the habit of these two men."[19]

Such an inflated and sometimes rhetorical use of "banditry" and of specific legal terms in these documents to designate the disruption of public and moral order was not, of course, in vain. In meting out punishment, the "habitual" nature of a crime—implied by the designation of banditry—was grounds for more severe penalties or sentencing, including corporal punishment. Although the penal law of the *shari'a* had certain fixed (*hadd*) punishments for highway robbery (*kat'al-tarik*), fornication (*zina*), theft (*sarika*), and homicide (*katl*), under which banditry cases were sentenced and punished, the stringent rules and procedures required by the *shari'a* made punishing such criminals so difficult that the political powers in various periods often created their own measures to keep public order. For example, there was a huge dispute among Muslim jurists as to whether attacks which did not take place in a public place or open country (i.e., literally meaning "highway") should be considered as highway robbery and punished accordingly.[20] Similarly, the stringent procedural rules, such as the necessity that the litigation be initiated by the claimant, or the difficulties of establishing legal proof (the need for proof as to the weapon, two witnesses, etc.), made the punishment of homicide in *shari'a* very difficult.[21] Thus, the principle of "habituation" for crimes such as theft, robbery, homicide, or abduction was introduced into the Ottoman *kanun*—in addition to other amendments—in order to enable the authorities to punish such crimes more easily and more effectively.

Abduction was criminalized from very early in the Ottoman legal system, with the sultanic lawbook (*kanunname*) of Bayezid II (r. 1481–1512). Though the very first lawbook of Mehmed II (r. 1451–81) was confined to the criminalization of adult heterosexual acts that assumed consent (i.e., fornication and adultery, in line with the definition of *zina* in *shari'a*),[22] the lawbook of Bayezid II introduced abduction (by force) and imposed the penalty of castration on those who abduct a woman or a girl. Furthermore, it also penalized the practice of marrying the woman to her abductor and punished the religious authorities who married the couple with a severe bastinado and by shaving off

19 "mezburanın bu misillü fısk ve fesad adet-i müstemirreleri olduğunu medine-i mezbur sükkanından … dokuz nefer kimesneler muvahabelerine aliü'l-tarikü'l-şehade haber vermeleriyle," BCR, B121, 38 (6 Rebiü'l-ahir 1155/9–10 June 1742).

20 Joseph Schacht, "Katl," in *Encyclopaedia of Islam, Second Edition*, ed. P. Bearman, et al. (Brill Online, 2008).

21 Fahmy, *A Sense of History*.

22 The definition of *zina* in *shari'a* is explained in the next chapter.

his beard.[23] Peirce convincingly argues that we must take into account female complicity (consent) in abduction, and the severe corporal and dishonorable character of the punishments (castration vs. the milder punishment of *zina* with a fine [*cürm*]); she thus shows that the punishment of the outlaws who threatened public order was arrogated to the state.[24] Moreover, the lawbook of Süleyman I (ca. 1540) extended the definition of abductor to indicate a gang of abductors, and penalized the accomplices of the abductor as well, also by castration or the bastinado and a fine.[25]

Yet, the principle of habituation gave political authorities the power to hand out even capital punishment to those who have a "constant habit" of crime or "fomenting corruption" while such an offense, in fact, incurred a lesser penalty in *shari'a*. The following article of the mid-sixteenth-century lawbook of Süleyman I, which lists all the "minor" offenses in one place and the sentence of capital punishment at the end, clearly reveals this intolerance, even in earlier periods before banditry became a problem of epidemic proportions:

> Furthermore, [a person] who steals a prisoner of war, lures away a male or female slave [from his or her master], lures away a boy, and goes away with him, breaks into a shop, enters a house [with intent to steal?] or patently commits theft several times shall be hanged.[26]

This article of the law book implicitly gives us a legal definition of "brigandage" or "banditry" according to Ottoman legal terminology. It reflects the claim of the imperial political power to preside in principle over public order; this claim became even more pointed in later periods when banditry, brigandage, and all sorts of power coalitions, including that of the provincial officials, rivaled Ottoman central authority in the provinces during the seventeenth and eighteenth centuries.

Heyd also states that the sultan and high government officials sometimes asked the *şeyhülislam* or other high-ranking muftis for a *fetva* to justify punishment beyond the normal *shari'a* penalties. According to some *fetva*s in the Topkapı Sarayı Archives issued in the first half of the eighteenth century, "people whose offenses are not, according to the religious law, capital may yet

23 Heyd, *Studies in Old Ottoman Criminal Law*, 58, 97; Ahmet Akgündüz, *Osmanlı Kanunnameleri ve Hukuki Tahlilleri*, vol. 2 (Istanbul: Fey Vakfı, 1990), 42–43. For a comprehensive analysis and comparison of the lawbooks of Mehmed II and Bayezid II with regard to sexual crimes, see Peirce, "Domesticating Sexuality," 111–116.

24 Peirce, "Abduction with (Dis)Honor," 316–319.

25 Ibid., 317; Heyd, *Studies in Old Ottoman Criminal Law*, 58–59, 97–98.

26 Heyd, *Studies in Old Ottoman Criminal Law*, 114, n. 74. Emphasis added.

be executed if it is proved, in accordance with *shari'a*, that it is their 'constant habit' (*adet-i müstemirre*) to commit such crimes."[27] In this sense, the desire of political powers to severely punish those who disturbed public order was established and acknowledged both in normative law and in practice.

In fact, *fetva* collections from the seventeenth and eighteenth centuries explicitly acknowledge the politico-legal authority (*siyasa shari'a*) to exert moral order over habitual outlaws and "bandits" by executing severe and corporal punishment, including capital punishment. In the logic of Islamic jurisprudence, the muftis often used "resemblance," which comes from the doctrine of "uncertainty" (*shubha*), as a legal reason to convert, a sentence from a fixed punishment (*hadd*) to a discretionary punishment (*ta'zir*). Abduction, "marriage over marriage," and "marriage by force" were subjects which all "resembled" *zina* but did not fulfill the *shari'a* requirements to be considered *zina*. In the first half of the eighteenth century, the *şeyhülislam* Yenişehirli Abbullah delivered a considerable number of of *fetva*s on the subject.[28] His work, *Behcetü'l-Fetava*, offers a couple of *fetva*s on unlawful marriages that all led to the infliction of discretionary punishment. For example, a man who "married" a woman, though aware that she had a husband in another town, was punished by severe chastisement (*ta'zir-i şedid*), as was one who lured and married a woman to another man.[29] It is interesting to note that in both *fetva*s, the question of whether the woman was to be punished or which penalty should be inflicted was not mentioned. Although seducing a woman is mentioned explicitly in the latter and implied in the former, it appears that the chief mufti considered it a unilateral act, since the woman was considered to have been led astray.

Marrying a woman by abducting her by force also found its way into discretionary punishment in *fetva*s for its resemblance to rape:

> If Hind marries [herself] to Amr after both Zeyd and Amr wanted to marry her, and then Zeyd abducts her by breaking into her house by day and detains her by force in his residence for a couple of days to convince her to divorce Amr and marry him, and Hind escapes without having intercourse with him, what is required for Zeyd? Answer: Severe chastisement (discretionary punishment) and imprisonment.[30]

27 Ibid., 195.

28 For more information on *Behcetü'l-Fetava*, see Özel, "Behcetü'l-Fetava."

29 Yenişehirli Ebü'l-Fazl, *Behcetü'l-Fetava ma'an-Nukul*, 50, 148.

30 "Zeyd ve Amrden her biri Hindi tezevvüce talib olur Hind nefsini Amre vech-i şeri' üzere tezvic ittikden sonra Zeyd naharen Hindin menziline girip cebren menzilinden ihrac ve kendu menziline götürüb elbetde Amrden boşanub nefsini bana tezvic eyle deyu birkaç

It should be noted here that the *fetva* explicitly mentions "not having intercourse." This indicates that the punishment would be either the fixed penalty in the case of rape, or the more severe discretionary punishment most probably the death penalty or at least long imprisonment.

Finally, Yenişehirli Abdullah delivered *fetva*s in favor of capital punishment (*siyaseten katl*—by order of the political authority) for the crimes of sodomy/pederasty (*livata*), highway robbery, usurpation (*ahz'ul-emval*), mass homicide (*katl-i nüfus*), and oppression (*zulm*) if the culprit "habitually carried out" these crimes. Interestingly, a man who commits forceful sodomy (*cebren livata*) with a boy who had not yet reached puberty and killed him as a result of this act was to be punished by paying financial compensation (*diyet*) in addition to severe chastisement and imprisonment. Yet, he would be sentenced to the death penalty only if it was his "habit."[31] The repetition of the offense of *livata* apparently seemed more important to Yenişehirli Abdullah than the severity of the act or the status of the victim.

Finally, it is apparent from the following *fetva* that executive authority was explicitly granted to political powers in the punishment of bandits and brigands:

> Is it lawful to sentence Zeyd to capital punishment in accordance with the order of the guardian of the command (*veliyyü'l-emr*) if he admits and confesses before the *shari'a* judge that he is one of the brigands who commit highway robbery, usurpation of people's property and money as well as mass homicide? Answer: Yes, it is lawful.[32]

A case recorded in an Ankara court in 1742 illustrates how establishing the accused as a habitual criminal with a history of sexual violence helped the litigants sentence him to capital punishment.[33] In this example, a certain Kamer and es-Seyyid Hasan came before the court and sued a certain Mustafa. First, Kamer sued Mustafa for assaulting her with a knife by the city walls, with the intention of attacking her "honor and property," even though he was only able

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gün Hindi menzilinde alıkoyub beynlerinde fi'l-i fahiş vaki olmaksızın Hind Zeydin yeddinden halas olsa Zeyde ne lazım olur? Elcevab: Ta'zir-i şedid ve habs," ibid., 150–151.

31 "Zeyd ve Amr ve Bekir ve Beşir, Halid-i sagire cebren livata idüb mezburların ol fi'l-i şeni'lerinden naşi Halid fevt olsa Zeyd ve Amr ve Bekir ve Beşire şeren ne lazım olur? Elcevab: Diyet ve ta'zir-i şedid ve habs-ı medid. Mutadları ise cümlesi siyaseten katl olunur." Ibid., 152.

32 Ibid., 152–153.

33 ACR, 121, 58 (Şevval 1154/January 1742).

to steal her jewelry. Mustafa accepted her accusation and agreed to give her property back. However, in the second accusation by Es-Seyyid Hasan in the same trial, the matter became more complicated. Es-Seyyid Hasan accused Mustafa of attacking his house in the middle of the night and attempting to rape his wife—a year earlier. He claimed that in that instance the accused escaped their hands, so they could not send him to trial. Then the witnesses were heard and they gave testimony not only to Mustafa's attack to Hasan's house and wife, but also to his habit of "wandering around, armed, attacking honorable people to take their money and property, entering others' houses and committing rape and sodomy against their families."

We cannot be sure that Mustafa ever attacked Es-Seyyid Hasan's house or attempted to rape his wife Kamer a year before he robbed her of her jewelry. But it is very plausible that the incident of sexual violence was brought up in order to declare Mustafa a habitual criminal, i.e., a bandit. Interestingly, the court sentenced Mustafa to death after the community presented a *fetva* from the local mufti, stating the following:

> … if Zeyd, who was from among the bandits and mischief-makers, continuously breaks into houses with a lethal weapon and commits "forceful" fornication with women and sodomy with the sons of some honorable men and thus violates their honor, and if he was habituated to such misdeeds and he is a fomenter of mischief [and this] has been established by the *shari'a*, is it lawful to kill him by "order of the guardian of the command" [imperial order]? Answer: Yes, it is…[34]

This *fetva* from the local mufti echoes the *fetva* of the *şeyhülislam* Yenişehirli Abdullah, mentioned earlier. Finally, the *kadı* of Ankara gave his verdict for the execution of Mustafa, in so far as an "imperial order" was to be obtained and therefore he was handed over to the political authority (*veliyyü'l-emr*). Since sentencing someone to death was a very important decision, he also applied to the higher authorities; first he obtained support from the mufti in the form of *shari'a* support and then a *siyasa* approval of the sultan.

This case reveals many important insights that enable us to understand the importance of proving the habituation of crime. First, it brilliantly reveals the

34 "…eşkıyadan olub muzırü'n-nas olan Zeyd daiman alet-i harble gece ile menzil basub bazı ehl-i ırz kimesnelerin ırzların hetk ve avretlerine cebren zina ve oğullarına livata itmek mu'tadı olub azrar-ı ibadullah bu makule zulm ve ta'addi adet-i müstemirresi olub ve sa'i bi'l fesad olduğu şer'an sabit olsa şaki-yi mezburun emr-i veliyyü'l-emr ile katli şuru' olur mu cevab olur deyu ifta…" ACR, 121, 58 (Şevval 1154/January 1742).

central role of sexual violence as one of the most important indicators that the accused was habituated to "violence." Es-Seyyid Hasan and the community, by bearing witness to his earlier actions, were apparently able to show the "excessiveness" of the violence of the accused by mentioning the numerous sexual assaults he had committed. The case also reveals the interplay of *shari'a* and *kanun* and the importance of applying for and obtaining the approval and discretion of the sultan to punish such "habitual" criminals.

In sum, many *kanun* articles and *fetva*s relating to the habitual criminality of the accused are directly related to sexual offenses such as abduction, "marriage by force" or sodomy. In other words, sexual transgression seems to have been considered one of the significant signs of being a habitual outlaw against public order, that is, a bandit. While, from the sixteenth century on, the imperial state started to criminalize and punish those habitual criminals by creating a criminal space for them in the intersection of custom, *kanun*, and *shari'a*, Ottoman subjects seem to have appropriated this rich repertoire that coupled sexuality and banditry more often in their petitions asking the Ottoman imperial state to protect their honor.

Sexual Violence, Honor, and the Imperial State

In the previous example, Es-Seyyid Hasan's petition to the Imperial Council claiming that Mahmud Çavuşoğlu Ali, the abductor, was actually a member of gang of bandits who was accustomed to violating people's honor also found an echo in Istanbul. He had also submitted a *fetva* of the *şeyhülislam* to support his cause. The imperial decree, by addressing the governor of Kütahya and two judges of the region, thus ordered that justice be rendered in situ and Es-Seyyid Hasan's wife Ummihan be returned to her husband. Although we do not know what happened afterward in terms of the court trial and the cleavage between these two men, we can clearly see from the record in the *Ahkam* registers that petitioning helped Es-Seyyid Hasan to trigger local mechanisms to expel Mustafa from the neighborhood and most probably to have his wife returned. He sought justice from the Imperial Council by denouncing the abduction of his wife as a sign of Çavuşoğlu Ali's brigandage.

Es-Seyyid Hasan was not alone in claiming the central government's protection of his honor. Despite being very rare, women also asked the state to protect their honor. (See Figure 3.2) For example, we have an imperial decree[35] that concerns a woman who was brutally tortured; this woman desperately

35 BOA, Anadolu Ahkam Defteri 3, case 208 (Cemaziye'l-ahir 1156/July 1743).

sought the protection of the central government. According to a sealed letter submitted to the Imperial Council by the vizier Hasan Paşa, who was the *ağa* of the janissaries in the imperial palace, two men from the Hamid district raided the house of Şerife Fatime, whose husband was away from home serving in the army. They tortured her brutally and attempted to kill her after claiming that she had assisted in the recent escape of their concubine. The description of the two men in the imperial decree reveals the fragile border between banditry and local notability: They are defined in the decree as being "from among the notables and usurpers, who claimed to be janissaries" (*ayan ve mütegallibeden ve yeniçerilik iddiasında olan*). The *ağa* of the janissaries of the imperial palace reported the case to the Imperial Council for two interrelated reasons: first, the criminal acts of these two men might be under his jurisdiction, since they claimed to be janissaries; and second, he might be responsible for the well-being of Fatime Şerife's husband and his family at home since he was serving in the imperial army, most probably as a janissary, at that moment. Yet, defining the accused as the guilty party might have been employed to attract the attention of the central administration.

The central administration's conscious participation—by taking the side of one party in this struggle—is apparent from the overall tone of the decree and from the detailed description of the "miserable" state of the woman. The explicit description of the torture and what happened afterward is astonishing when compared to the condensed and formulaic summaries in other imperial rescripts:

> They chained her neck, wrists and feet, tortured her by putting packs of "fire-sand" to her temples and mouth as a result of which she lost her sight and "self-control." After torturing her and stealing her property, the tyrants handed her to another person who was supposed to kill her. He, however, had mercy on her and left her in the mountains, where she stayed naked and moaning for twenty-six days.[36]

After describing the event, the imperial decree used the formula that she could not "hold out against them" because of her miserable condition.[37] Even though the wording in the rescript looks like a repetition of the letter of the janissary *ağa* of the imperial palace, the very act of quoting his description of the

36 "…menzilini basub boğazına zincir ve ellerine bilekçe ve ayağına iki timur urub dürlü cevr ve ağız ve şakaklarına ateş kumlarıyla ve gözleri 'alile ve malik olduğu altı kiselik eşya ve menzilini zabt ve katli içun bunu bir ademi yeddine virüb merkum dahi merhameten dağda bırakıp yirmi altı gün uryan ve nalan ahvali gayet digergun ve ma'zure olmağla…."

37 "…mezburlar ile mahallinde mukavemet idemeyeceğini izhar itmekle…."

FIGURE 3.2 *An old woman presenting her grievance to Süleyman I (hunting in Üsküdar) about his soldiers' cruelty to her daughter who as a result miscarried her baby.* Hünernâme*, Seyyid Lokman.*
TOPKAPI PALACE MUSEUM LIBRARY, H 1524, FOLIO 152B.

incident in the imperial decree addressed to the commander-in-chief (*serdar*) and the *kadı* of Hamid reveals that the central administration agreed, at the least, with the definition of him as an "outcast" or persona non grata. Thus, through its wording, which emphasized the degree of violence Fatime Şerife experienced from these two men, the central government showed the local authorities that they would be watching the legal course. The central government in fact sent an agent from Istanbul to supervise the local court trial, and further ordered the commander-in-chief (*serdar*) of Hamid to send the accused to the imperial court in Istanbul if justice could not be rendered locally.

The violent assault on Şerife Fatime in her husband's absence by the so-called "outcasts" brings us back to the central question of this chapter, which concerns the connection of banditry, gender violence, and honor in the documents. This chapter has observed that power struggles among the local power holders as well as with the central administration were frequently reflected through and embodied in the sexual sphere. As Paul Sant Cassia suggests with regard to Mediterranean societies, "women's physical safety was threatened in contests between rival men, their protection was claimed by the state, and their identity questioned if they transgressed the normative gender order."[38] Therefore, transgressing the normative gender order was a very important symbol of excessive "violence," tantamount to transgressing the control of the state.

Thus, sexual violence became one of the most important symbols of banditry on which Ottoman subjects established other claims. And most importantly, the imperial state laid claim to protecting the "honor" of its subjects, and to maintaining its legitimacy by establishing law and order throughout the entire society. So, protecting the safety of Fatime Şerife, in her husband's absence—especially as her husband was actually serving the state on a military expedition—was the moral duty of the state, and such a minor incident was taken very seriously by the Imperial Council. As a result, an imperial decree appointed the commander-in-chief (*serdar*), not a lower-ranking administrative officer, to capture these two men and send them to the local court to be tried and punished. It also insisted that the bandits be sent to the imperial court in Istanbul and shown no mercy or tolerance if the case could not be resolved locally.

Cornell H. Fleischer's analysis of two petitions submitted to Süleyman I by a woman also reveals the importance of women's safety with regard to the

38 Julie Skurski and Fernando Coronil, "Introduction," in *States of Violence*, ed. Fernando Coronil and Julie Skurski (Ann Arbor: University of Michigan Press, 2006).

imperial state's claims of sovereignty and justice.[39] According to the petition, Sultan Selim I, the father of Süleyman, asked a woman from Bergama, a town in western Anatolia, to travel alone from one town to another with some goods in order to test the safety and order of the central region under his command. A couple of men attacked her, stole her goods, and inflicted bodily harm on her, causing a miscarriage and the loss of her teeth. Her first petition, "couched in everyday speech," was more of an informal plea for justice that she could not attain from the provincial legal authorities to whom she had previously applied. This neglect was also considered the indifference of the sultan himself (Selim I) as the one who was responsible for justice and the one who actually sent her on this trial. The second petition was composed in a more formal language and rhetorical framework—in a manner similar to what we have seen elsewhere—and was submitted to Süleyman I in Belgrade during his first Hungarian campaign in 1521. Fleischer points out that in the second petition "the quest for justice is transformed into service in the new sultan's campaign which, together with her service to his father, makes her his loyal servitor eligible for the grants due all loyal campaigners, for herself, her gender notwithstanding, and her male offspring."[40]

While the transformation of the language, rhetoric, and narrative exhibited in the petitions is noteworthy, as we are able to see how seeking justice was gradually formalized as loyal service and imperial subjecthood within the legitimate discourse of the Imperial Council as discussed earlier, the content and the context of the event are equally worthy of analysis, as Fleischer indicates. He calls our attention to the context in which Selim I asked for such "an extraordinary experiment" in order to measure the "order of the world" (*nizam-ı alem*). While on the one hand, such an unusual request might contribute to his repute as a ruler of justice, on the other hand, his insecurity about his sovereignty, particularly in terms of his control over and the allegiance of the subjects of Anatolia (after six- or seven-years of succession struggles with his rival brothers) better explains why he commanded such an experiment. I also believe that the woman's claim for sultanic justice, based on her narrative, reflects the symbolic meaning of women's safety in terms of imperial sovereignty even if the sultan never asked for the trial, "such a command does not seem to be outside the bounds of the possible" as Fleischer states. The social and

39 Cornell H. Fleischer, "Of Gender and Servitude, ca. 1520: Two Petitions of the Kul Kızı of Bergama to Sultan Süleyman," in *Mélanges en l'honneur du Prof. Dr. Suraiya Faroqhi*, ed. Abdeljelil Temimi (Tunis: Fondation Temimi pour la recherche scientifique et l'information, 2009).

40 Ibid.

political disorder in Anatolia before and during Selim I's reign, in which this woman's physical safety represented "the order of the world," can be compared to the importance of Şerife Fatime's safety for the Ottoman central government, against which "bandits" and provincial notables established a similar socio-political threat in the eighteenth century.

The phenomenon of women symbolizing the honor of the masculine nation has been analyzed in feminist critiques of liberal citizenship and the public-private distinction in the European context and of nationalism in the Middle East.[41] However, it has rarely been analyzed with regard to the operations of early-modern states in the private and social spheres, despite the fact that the importance of honor codes on the socio-legal level has been much emphasized and studied by scholars both in European and Ottoman studies.[42]

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41 For some prominent examples of this literature in the Middle Eastern context, see Deniz Kandiyoti, "Identity and Its Discontents—Women and the Nation," *Millennium-Journal of International Studies* 20, no. 3 (1991); Kandiyoti, "Some Awkward Questions on Women and Modernity in Turkey," in *Remaking Women: Feminism and Modernity in the Middle East*, ed. Lila Abu-Lughod (Princeton, NJ: Princeton University Press, 1998); A. Najmabadi, "The Erotic Vatan [Homeland] as Beloved and Mother: To Love, to Possess, and to Protect," *Comparative Studies in Society and History* 39, no. 3 (1997); Nira Yuval-Davis, *Gender and Nation* (London, California, New Delhi: Sage Publications, 1997); Lila Abu-Lughod (ed.), *Remaking Women: Feminism and Modernity in the Middle East* (Princeton, NJ: Princeton University Press, 1998); Nikki R. Keddie and Beth Baron, *Women in Middle Eastern History: Shifting Boundaries in Sex and Gender* (New Haven, CT: Yale University Press, 1991); Lerna Ekmekcioglu, "A Climate for Abduction, a Climate for Redemption: The Politics of Inclusion During and after the Armenian Genocide," *Comparative Studies in Society and History* 55, no. 3 (2013); Kozma, *Policing Egyptian Women*. For the definition of national honor in gendered terms in the European context, Nicoletta Gullace, *The Blood of Our Sons: Men, Women, and the Renegotiation of British Citizenship During the Great War* (New York: Palgrave Macmillian, 2002); Nancy M. Wingfield and Maria Bucur, *Gender and War in Twentieth-Century Eastern Europe* (Bloomington: Indiana University Press, 2006); Patrizia Albanese, *Mothers of the Nation: Women, Families, and Nationalism in Twentieth-Century Europe* (Toronto and Buffalo: University of Toronto Press, 2006).

42 For some examples in the Middle Eastern context, Marcus, *The Middle East on the Eve of Modernity*; Tucker, *In the House of the Law*; Peirce, *Morality Tales*; Tucker, *Women, Family, and Gender*; Peirce, "Abduction with (Dis)Honor." There is an extensive body of literature on Mediterranean honor and its critique. See Jean G. Péristiany, *Honour and Shame: The Values of Mediterranean Society* (London: Weidenfeld and Nicolson, 1966); Michael Herzfeld, *The Poetics of Manhood: Contest and Identity in a Cretan Mountain Village* (Princeton, NJ: Princeton University Press, 1985); David D. Gilmore, *Honor and Shame and the Unity of the Mediterranean* (Washington, DC: American Anthropological Association, 1987); João Pina-Cabral, "The Mediterranean as a Category of Regional Comparison: A Critical View," *Current Anthropology* 30, no. 3 (1989); Dionigi Albera, "Anthropology

A few recent studies in Ottoman history argue that honor has been utilized in a contractual and reciprocal manner between individuals and groups in society as well as between the state and subjects in the early-modern Ottoman context.[43] European historians have extensively analyzed European duel culture and the relationship between honor and aristocratic feudal values in the early-modern periods.[44] However, European historiographies often emphasize the prevalence of honor as a masculine value and a status code in interpersonal and communal relationships in the medieval and early-modern societies while pointing out Elias' "civilizing process" as a reason behind the fading of honor as an identity marker in the modern world.[45] Historians and feminists have criticized such a binary construction of the traditional and the modern,[46] and argue that honor and violence still plays an important role in contemporary societies in the creation of gendered or otherwise group and individual

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of the Mediterranean: Between Crisis and Renewal," *History and Anthropology* 17, no. 2 (2006); Peregrine Horden and Nicholas Purcell, *The Corrupting Sea: A Study of Mediterranean History* (Oxford, UK and Malden, MA: Blackwell, 2000).

43 Peirce, who has studied importance of morality and honor in early-modern Ottoman socio-legal context, recently argued that honor was a relational phenomenon and a social contract between Ottoman subjects and legal authorities in sixteenth- and seventeenth-century Anatolia. I argue that by the mid-eighteenth century this long-lasting social contract was transformed into a "constitutional contract" between the state and subjects. Leslie Peirce, "Honor, Reputation, and Reciprocity," *European Journal of Turkish Studies* [*Online*] 18 (2014), http://ejts.revues.org/4860; Başak Tuğ, "Gendered Subjects.".

44 For some of them, see Robert Baldick, *The Duel: A History of Duelling* (New York: C.N. Potter, 1965); Ute Frevert, *Men of Honour: A Social and Cultural History of the Duel* (Cambridge, MA: Polity Press; Blackwell Publishers, 1995); François Billacois and Trista Selous, *The Duel: Its Rise and Fall in Early Modern France* (New Haven, CT: Yale University Press, 1990); Barbara Holland, *Gentlemen's Blood: A History of Dueling from Swords at Dawn to Pistols at Dusk* (New York: Bloomsbury, 2003); Steven C. Hughes, *Politics of the Sword: Dueling, Honor, and Masculinity in Modern Italy* (Columbus: Ohio State University Press, 2007); Renato Barahona, *Sex Crimes, Honour, and the Law in Early Modern Spain: Vizcaya, 1528–1735* (Toronto and Buffalo: University of Toronto Press, 2003).

45 With modernization, as Elias asserts with his "civilizing effect," Ute Frevert claims that people lost the emotional feature of honor, even though the notion is still prevalent in the modern societies. Ute Frevert, *Emotions in History: Lost and Found* (Budapest and New York: Central European University Press, 2011); Norbert Elias, *The Civilizing Process, State Formation and Civilization* (Oxford: Blackwell, 1982).

46 Valerie Traub, "The Past is a Foreign Country? The Times and Spaces of Islamicate Sexuality Studies," in *Islamicate Sexualities: Translations across Temporal Geographies of Desire*, ed. Kathryn Babayan and Afsaneh Najmabadi (Cambridge, MA: Harvard University Press, 2008).

identities.[47] Ute Frevert also points to the similarities between Mediterranean societies today and the noble and middle-class culture of nineteenth-century European societies, who put a high price on family honor and its associated female chastity, for which men are held men responsible.[48] However, when it comes to the construction of the state-subject relationship in honor terms, the existing studies mostly concentrate on the transformation of the utilization of honor and gender roles toward more democratic as well as regulatory directions, which arguably took place mostly from the nineteenth century onward.[49] However, there are relatively fewer studies on honor in terms of political authorities' attention to the private realm for the early-modern periods. This may be related to the *very* definition of public and private with reference to modernity. Civil and private are assumed to be considered outside the state in the Habermasean definition of the public sphere,[50] and thus honor has

47 Shani D'Cruze and Louise A. Jackson, *Women, Crime and Justice in England since 1660* (Houndmills, Basingstoke, Hampshire and New York: Palgrave Macmillan, 2009).

48 Frevert, *Emotions in History*, 70. While using a historical explanation for the existing and lost emotions of honor for European societies, Frevert still uses a cultural explanation for Mediterranean and Middle Eastern societies, and does not pay adequate attention to the changes in the meaning of honor for historical actors in various times in these regions.

49 Ann Goldberg conceptualizes German litigious culture by looking at defamation litigation in the years of the Kaiser (1871–1914) as an expression of "claim rights" that associated honor with those of modern citizenship and equal rights, together with practices associated with mass, participatory politics. In that sense, she states: "On the one hand, it shows honor lawsuits to be tools of state repression and the defense of corporate interests. In this sense, honor and its litigation functioned to reinforce existing hierarchies and power structures. On the other hand, the defamation suit was becoming a tool of democracy, one that made sense in a society where status and identity remained closely bound up with honor. Taken together, these two aspects of libel litigation had the effect of massively juridifying conflict, creating a society of surveillance and censorship that, to an extraordinary extent, brought the state at every turn into the lives of private citizens, politicians, and public officials." Ann Goldberg, *Honor, Politics and the Law in Imperial Germany, 1871–1914* (Cambridge and New York: Cambridge University Press, 2010), 11, 13. For the French context, see Andrea Mansker, *Sex, Honor and Citizenship in Early Third Republic France* (Houndmills, Basingstoke, Hampshire, and New York: Palgrave Macmillan, 2011).

50 Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (Cambridge, MA: MIT Press, 1989). For a feminist critique of Habermas' universal public sphere which excludes marginal groups through hegemonic domination, see Nancy Fraser, "Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy," in *Habermas and the Public Sphere: Studies in Contemporary German Social Thought*, ed. Craig J. Calhoun (Cambridge, MA: MIT Press, 1992).

remained within the conceptual boundaries of this public-private distinction without considering the agency of early-modern state structures.

On the one hand, the relationship between the public and private which made the violation of privacy a public matter in the early-modern Islamic context was quite different from the European conception. On the other hand, the patriarchal roots of violence were not much different in the early-modern world. According to Carole Levin and Joseph P. Ward who work on gender and politics in early modern England,

> early modern claims of political authority were often expressed through violence. States and factions tested one another through warfare, but violence was also displayed in more routine encounters between those with and those without power. The right to the legitimate use of violence was a possession of most adult men, from the top to the bottom of the social hierarchy.[51]

These men were government officials of the king's council or provincial constables or heads of households.[52]

Yet, the notion of honor is largely related to the definition of privacy in early-modern Islamic cultural geography. We cannot understand the Ottoman state's intrusions in the "private" lives of its subjects and claims to protect their honor outside this larger framework. Lange and Fierro warn us against "the danger of artificially exporting a conceptual dichotomy (of private and public) anchored in the Western social sciences into contexts which are fundamentally alien to it."[53] They argue that Islamic literature favors expressions related to the Western concept of privacy, whereas, the definition of the public sphere in pre-modern Islam starts with the inverse of this concept of private. Terms such as *haram* or *mahzur* (forbidden), *sir* or *maktum* (secret), *sitr* (veiling), *hurma* (inviolability), *awra* (anything that someone conceals out of shame or prudence) occupy a larger space than antonymic concepts such as *alaniyya* (open,

51 Joseph P. Ward, *Violence, Politics, and Gender in Early Modern England* (New York: Palgrave Macmillan, 2008), 1.

52 Susan Dwyer Amussen, "Punishment, Discipline, and Power: The Social Meanings of Violence in Early Modern England," *Journal of British Studies* 34 (1995), 5, as quoted in Ward, *Violence, Politics, and Gender*, 1. For the close correlation between honor and violence in early-modern Spain, see Scott K. Taylor, *Honor and Violence in Golden Age Spain* (New Haven, CT: Yale University Press, 2008).

53 Christian Lange and Maribel Fierro (eds.), *Public Violence in Islamic Societies* (Edinburg: Edinburgh University Press, 2009), 3.

manifest), or *tashhir* (making well-known, notorious).[54] Thus, in pre-modern Islam the public sphere is defined not only as the opposite of private, but as its negative, that is, the sphere of life that is not protected from unwanted intrusions of power. Definitions of privacy in the Islamic context imply not only territorial and spatial privacy but also two other inviolabilities: the privacy and dignity of the human body and the inviolability of a person's reputation and honor. Violence in this context is the act of unveiling others and "tearing apart the veil of integrity" (*hetk-i ırz*). Sexuality, which is at the intersection, is the very inner core of the three components that define privacy, that is, the inviolability of space, body, and honor, and thus in the Islamic and early-modern Ottoman world, an attack on the sexual sphere represents a violation of the space, body, and honor, all at once.

In Şerife Fatime's case, the violation of all three dimensions of privacy is apparent: the accused violated her territorial immunity by entering her house, then violated the right of the human body by torturing her, and as a result, violated the honor of Şerife Fatime and her husband while he was absent. Yet, the violation of the privacy of an Ottoman woman or man was not only a private act of violence, but also a public one that also violated the honor of the Ottoman state. In other words, the violation of the private was also a violation of the state's claim to have a monopoly over legitimate violence as the sole authority to interfere and destroy the privacy of its subjects' bodies. Thus, in the early-modern context the Ottoman state's surveillance and the protection of the honor of its subjects against sexual crimes can also be read as a claim to the legitimate use of violence. As the "sovereign" who was delegated to prosecute *hadd* crimes (offenses against God) on God's behalf, Ottoman sultans and their governments claimed a monopoly over violence through various *kanun* statutes on sexual crimes.

In fact, one of the most frequently encountered terms in eighteenth-century legal documents, which the central government and petitioners used in their correspondences, is *hetk-i ırz* (violation of honor), as we have seen in the previous examples. Like the mutual rhetorical usage of "banditry" by the Ottoman state and its subjects, so too the notion of honor and the legal term *hetk-i ırz* was established in this dialogic process. The term was often coupled with "bandits" and used to describe certain people's cruelty and assaults on others' honor, i.e., assaulting their families, wives, and children, slandering them, and in certain cases physically attacking them.[55] The offense of breaking into others' houses

54 Ibid., 4.

55 For examples of such a general expression, see "…ehl ü iyallerine taarruz ve nice ehl-i ırz kimesnelere şütûm ve hetk-i ırz eyledikten maada…," BOA, Anadolu Ahkam Defteri 3,

and assaulting women and girls,[56] and specifically committing sexual assault (*fi'l-i şeni'*) against a woman, girl or boy[57] were generally described by the term *hetk-i ırz* in the petitions and the imperial registers in the eighteenth century.

While the expression *hetk-i ırz* literally means "tearing [one's] honor" and "disgracing someone" in Arabic,[58] *hetk* itself acquired a meaning that implicitly accommodates *ırz*, "honor." Moreover, the term *hatika* stems from the same root, which means "dishonor."[59] The meaning of the term *ırz* (*'ırd* in Arabic) corresponds approximately to "the idea of honor, but is somewhat ambiguous and imprecise" in Arab culture.[60] The term does not appear in the Qur'an. It comes from ancient Arab customary practice. Honor, which was regarded as a sacred ethical principle, regulated various aspects of the moral life, manners, and social institutions among pre-Islamic Arabs.[61] During the course of Islamic history, it lost its rich and complicated meaning and came to be associated with reputation (*sharaf*). In today's Arabic usage, its patriarchal roots have become more pronounced and its meaning is restricted to a woman's virtue and a man's honor that derives from the reputation of his wife or female relatives.[62]

Faranciszek Meninski's famous *Lexicon Turcico-Arabico-Persicum* published in 1680[63] gives us the impression that the Ottomans used the expression in the

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case 27; "…ehl-i ırz olanların ırzlarına ve emvallerine taarruz ve nicelerin ırzlarını hetk ve bunun emsali zulm ve ta'addilerinin nihayetleri olmayub…" BOA, Anadolu Ahkam Defteri 3, case 447; "…ve ehl-i ırzın ırzlarına hetk ve mallarına garet…," BOA, Anadolu Ahkam Defteri 1, case 343; and BOA, Anadolu Ahkam Defteri 3, case 356.

56 BOA, Anadolu Ahkam Defteri 3, case 118; BOA, Anadolu Ahkam Defteri 3, case 529; BOA, Anadolu Ahkam Defteri 1, case 227, and BOA, Anadolu Ahkam Defteri 1, case 263.

57 "…nam hatuna fi'l-i şeni kasdıyla taarruz ve hetk-i ırz ve ziyade gadr etmeğle…," BOA, Anadolu Ahkam Defteri 3, case 537; and "…bunun oğlu (boş) nam sagiri bin yüz elli (boş) senesinde ahz ve bir mahalle götürüb fi'l-i şeni' kasdıyla taarruz ve hetk-i ırz ve ziyade gadr ve ta'addi ve fesad itdüğü…," BOA, Anadolu Ahkam Defteri 3, case 648.

58 Hans Wehr and J. Milton Cowan, *A Dictionary of Modern Written Arabic* (Wiesbaden: Harrassowitz, 1980), 1018.

59 Bichr Farès, "'Ird," in *Encyclopaedia of Islam, Second Edition*, ed. P. Bearman, et al. (Brill Online, 2008).

60 Ibid.

61 Ibid.

62 Ibid.

63 Meninski (1623–89) was a Polish linguist of French origin. He accompanied the Polish ambassador to the Porte in 1653. He learned Turkish from Ali Beg and others and became interpreter to the Emperor of Austria. Meninski's lexicon is very important to Ottomanists studying seventeenth-century usage. Franciscus à Mesgnien Meninski, *Thesaurus Linguarum Orientalium Turcicae-Arabicae-Persicae* (*Lexicon Turcico-Arabico-Persicum*), ed. Stanislaw Stachowski and Mehmet Ölmez (Istanbul: Simurg 2000).

late seventeenth century and perhaps before.[64] It defines *hetk-i ırz* as "lacerare famam" (to tear one's reputation, to dishonor), and "dishonorare, diffamare, smaccare" (to dishonor, to slander, to degrade).[65] It explains *hetk* literally as "dilacerare, rumpere (to tear, to break) operimentum, velum (the veil)"[66] and *ırz* as "reputation, honneur, renommée, estime" (reputation, honor, fame, esteem).[67] The beginning of the utilization of the expression in Ottoman legal language, at least in an observable manner, seems to correspond to approximately the same period. With regard to sixteenth-century legal documents, Peirce shares her observation that "it is rare to find explicit mention of honor in contemporary sources dealing with abduction or other acts that might appear to us as honor-laden."[68] Furthermore, the term *hetk-i ırz* cannot be found in Islamic jurisprudence or in sultanic lawbooks. Thus, the entrance of the expression into legal language to refer regularly to disgracing and dishonoring someone through various assaults, including sexual violence, is apparently a post-sixteenth-century phenomenon. The rise of provincial unrest and "bandit" raids might have played an important role in the development of such a powerful moral discourse in the seventeenth and eighteenth centuries.

Interestingly, in eighteenth-century legal practice we encounter the term more in the conversation between the central government and Ottoman subjects than in local court documentation.[69] The association of sexuality with honor was not of course a novel phenomenon for Ottoman society.[70]

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64 I would like to thank Noémi Lévy Aksu for reading and translating the terms in Meninski's Lexicon.

65 Meninski, *Thesaurum Linguarum Orientalium Turcicae-Arabicae-Persicae*, 3:5438–5439.

66 Ibid., 3:5438–5439.

67 Ibid., 2:3246.

68 Peirce, "Abduction with (Dis)Honor," 324.

69 I have encountered the term as it was used in the Ahkam registers in a volume of Üsküdar court records for the years 1154–55 (1741–42), transcribed in an MA thesis. See cases 88, 114, 246 and 308 in Ayhan Uçar, "Üsküdar Mahkemesi'ne Ait 403 Numaralı Şer'iyye Sicili" (MA thesis, Marmara Üniversitesi, 2004), 129, 140–141, 200, and 229 respectively. Interestingly enough, Üsküdar, and probably other Istanbul court records appear to share the language and terminology of the Imperial Council due to its proximity and intimate connections with the Imperial Council. For a more detailed explanation of the peculiar nature of Istanbul courts, see Chapter 5.

70 To see how honor and reputation acquired an important moral function in relation to sexual and moral order of Ottoman society before and after the eighteenth century, see Peirce, "Seniority, Sexuality, and Social Order"; *Morality Tales*; "Abduction with (Dis)Honor"; "Honor, Reputation, and Reciprocity"; Semerdjian, *"Off the Straight Path"*; Tucker, *In the House of the Law*; Baer, "Death in the Hippodrome"; Esmer, "The Precarious Intimacy of Honor"; Kozma, *Policing Egyptian Women*.

However, highlighting honor, especially in the correspondence between the central power and Ottoman subjects, points to the development of new parameters between the early-modern state and its subjects on moral terms. In other words, the imperial power claimed that it was bound to protect the honor of its subjects and, in turn, at least some Ottoman subjects started to request such protection from the state through legal means. Liat Kozma shows us that existing social norms of honor and women's virginity became a legal category of violation of honor and legitimized the interventions of police in community and family life in late nineteenth-century khedival Egypt. She also demonstrates the reciprocal construction of a notion of public honor by the courts and councils as well as by the litigants in cases of defloration.[71] In a similar manner, the close examination of the term in eighteenth-century legal documents shows that such a relationship or claim based on honor began to be established even before the establishment of a state-society relationship based on citizenship rights over the protection of life, honor, and property in the nineteenth century.[72]

In the legislative codifications of the nineteenth century, we frequently come across the phrase "violation of honor" utilized as regular and mainstream terminology. Although the Criminal Code of 1851 (Kanun-ı Cedid) contained few criminal offenses and used the term *hetk-i namus* only once,[73] *fi'l-i şeni'* (indecent act) and *hetk-i ırz* became usual and most-frequently used terms, replacing the *shari'a*-laden *zina* and diversifying sexual crimes in the Criminal Code of 1858.[74] The usage of these two terms in the Code of 1858 gives us indications about their meanings in previous centuries as well; *hetk-i ırz* was used as an umbrella heading under which different types of *fi'l-i şeni'* offenses such as adultery, defloration, rape, sodomy, and molestation were gathered.[75] The emphasis on honor in conceptualizing sexual offenses and sexuality becomes more apparent when such a clustering was codified. Yet, the usage of the term in the eighteenth century was no different; it referred to the violation of one's honor through various assaults on a person, among which sexual assault was the most disgraceful. Interestingly, the French Penal Code of 1810, from which

71 Kozma, *Policing Egyptian Women*, 100–116.

72 For a more detailed analysis of the Tanzimat reforms and the criminal codes of the nineteenth century with regard to the discourse of honor, see Tuğ, "Gendered Subjects in Ottoman Constitutional Agreements."

73 Ahmet Akgündüz, *Mukayeseli İslam ve Osmanlı Hukuku Külliyatı* (Diyarbakır: Dicle Üniversitesi Hukuk Fakültesi Yayınları, 1986), 825.

74 The next chapter discusses *zina* (fornication) in normative law and the usage of *fi'l-i şeni'* (indecent act) in Ottoman legal practice.

75 Akgündüz, *Mukayeseli İslam*, 864–866.

the Ottoman Criminal Code of 1858 was adopted, used the French version of *hetk-i ırz* in the heading: "Attacks upon morals" ("attentats aux moeurs").[76] Moreover, the same terminology seems to have been used in the Egyptian legal code as early as 1830.[77] While the term *ghasb* (*gasb* in Turkish) was used in the courts to refer to rape, with the sense of "taking something by force" in seventeenth-century Aleppo,[78] terms with stronger honor connotations, such as *igthisab* (meaning, "to usurp violently what belongs to the other") and *hatk al-'ird* (*hetk-i ırz* in Turkish) replaced *zina* and *ghasb* in juridical vocabulary to refer to rape in the nineteenth- and twentieth-century Arab world.[79]

Yet, it appears that the idea of a "violation of honor" and "attack upon morality" in Ottoman legal language precedes the era of legal reform in the Ottoman Empire and in France.[80] Just as the old *kanunname*s were codifications of an amalgam of customary law and *shari'a*, the criminal codes of the nineteenth century can be read as codifications and institutionalizations of Ottoman legal custom and terminology which was already in use during the eighteenth century and even before—albeit it was influenced in the nineteenth century by foreign practices, too. Furthermore, the use of a language that was not directly borrowed from Islamic jurisprudence and the appearance of this terminology in nineteenth-century codes can also be read as a continuation of a *kanun* tradition that created its own language and legal culture, though not necessarily contradictory to that of the *shari'a*.

Thus, the association of honor and sexuality with the use of the term *hetk-i ırz* in the communications between the Imperial Council and Ottoman subjects in the petitionary documents of the mid-eighteenth century, points to

76 "Attentants aux Moeurs" in Livre III, Titre II, Section IV in *Code Pénal de 1810* (*Texte intégral—État lors de sa promulgation en 1810*), http://ledroitcriminel.free.fr/la_legislation_criminelle/anciens_textes/code_penal_de_1810.htm. For its English version, see *The Penal Code of France: Translated into English with Preliminary Dissertation and Notes.*, trans. Mr. Evans (London: H. Butterworth, 1819).

77 Illegal defloration (*izalat bakarat bint*) was considered among the offenses against a person's honor (*'ird*). See Liat Kozma, "Musta'amala minmudda: Stories of Defloration and Virginity," in *16th Middle East History and Theory Conference* (University of Chicago, 2001), 2. Rudolph Peters, "Islamic and Secular Criminal Law in Nineteenth Century Egypt: The Role and Function of the Qadi," *Islamic Law and Society* 4, no. 1 (1997): 81–82.

78 Semerdjian, *"Off the Straight Path,"* 146.

79 Ibid.; Sonbol, "Law and Gender Violence," 287–288.

80 Despite the fact that it is beyond the limits of this study, it is worth exploring whether there was any interaction between the early-modern legal cultures of the Ottomans and French which would have created a common terminology as reflected in their codified penal codes of the nineteenth century.

seeds of change in moral attitudes and the regulation of morals. While by the nineteenth century such a regulation was accentuated more in governmental thinking and the technologies of the modern state, its roots were based in the relationship between Ottoman imperial power and its subjects in the eighteenth century. As noted, one of the legitimizing strategies of the early-modern Ottoman state in the eighteenth century was its claim to protect the "honor" of its subjects. The protection of honor was closely related to the maintenance of law and order in society, especially in the provinces where local power-brokers threatened the "honor" of the state, too. In this changing relationship between the Ottoman central government and its subjects, the petitioning process must have played an important role in the intermingling of different genres and in the spread of moral values and legal categories that reflected these values.

In brief, this chapter analyzed banditry as a legal and social discourse by concentrating on the language of state documents and by consciously avoiding the actual social identity of the people called "bandits." I argue that the terminology corresponding to banditry was used rhetorically in an inflated manner when one of the parties wanted to stigmatize and criminalize certain groups or individuals. Parallel to this, the control of "excessive violence" was a symbol of honor, justice, and sexual order that the Ottoman state claimed to protect in the eighteenth century. In this sense, sex was "one of the primary languages" through which these conflicts and claims "were articulated."[81] In such a context, sexual violence became a very important symbol of the "habituation" of criminality, which threatened the claim of the Ottoman political authority to protect justice and order in that century.

The close association of honor and sexuality through the use of the term *hetk-i ırz* in petitions sent by Ottoman subjects to the Imperial Council points to a discursive shift in how morality was negotiated to mediate relations among Ottoman subjects, local and imperial officials, and the imperial center in the eighteenth century. The governmental technologies of the modern nineteenth-century state seem to have been rooted in the relationship between the Ottoman imperial government and its subjects in the eighteenth century. By claiming that it "protected (the) honor" of its subjects, in order to gain control over moral order in society, against those who threatened them, imperial authorities attempted to usurp both existing customary powers, such as that of community, and newly emerging provincial powers that the central state vaguely labeled as "bandits" or "outlaws."

81 David Nirenberg, "Conversion, Sex, and Segregation: Jews and Christians in Medieval Spain," *American Historical Review* 107, no. 4 (2002).

CHAPTER 4

The Repertoire of Sexual Crimes in the Courts

Legal pluralism in the eighteenth-century Ottoman Empire is evident in the multiplicity of legal institutions which operated in a loosely defined hierarchical structure, as demonstrated in the second chapter through the petitioning process. Parallel to this institutional plurality, legal definitions and categories were being continually reworded because there was no single codified law and no single institution to fix the meaning of these definitions, as, for example, we have now in the modern world. In addition, social actors or the community as informants, witnesses, and mediators, were an integral part of the early-modern Ottoman legal system, and played a very important role in demarcating the licit from the illicit. Thus, individual and communal definitions of the illicit, which did not always agree, contributed to these definitions in the courts.

This chapter is, first, an attempt to create a taxonomy of sexual offenses as defined through this common enterprise. I explore the way in which everyday forms of sexual deviance and violence were introduced into the language of Ottoman legal practice. I analyze how the complexities and multiplicities of everyday experience were translated into the legal language of the courts. In doing so, I endeavor to form a genealogy of certain legal terms that were used to describe sexual offenses in eighteenth-century Ottoman courts. In that sense, I trace, as much as possible, the historical and legal relationship of these terms in different legal spheres such as *kanun*, *fiqh*, and *fetva*s. At the same time, I investigate the way in which these different spheres influenced each other in the matter of vocabulary and the categorization of sexual offenses.

Through this rudimentary charting of legal categories and exploration of the vocabulary utilized for sexual offenses, in the current chapter I demonstrate how the flattening language of the courts, which, in fact, confined the multiplicities of everyday life to the existing legal discourse, and at the same time opened the possibility of redefining and proliferating the terms for sexual crimes in the Ottoman legal milieu of the eighteenth century. By expanding on existing *fiqh* and *kanun* terminology and inventing its own terminology, Ottoman legal practice seems to have created its own discourse in order to scrutinize deviance more effectively. Such a discussion of the discourse exercised in legal practice prepares the ground, through an investigation of the punishments meted out for sexual offenses, for a deeper analysis of the regulation of sexual mores and practices. Preparing the ground is crucial not only to understand the specific historical details of the categorization and vocabulary

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used in the eighteenth century, but also to analyze how these categories were utilized in legal practice. The current and the last chapter therefore argues that the proliferation in definitions of sexual crimes enabled politico-legal power to scrutinize the gender order and, in the final analysis, punish sexual deviances more effectively.

Why *fi'l-i şeni'* (Indecent Act), but Not *zina*

In contrast to the modern system of law, in most criminal cases the early-modern Ottoman legal system required the initiation of litigation by the injured party. This party might be the alleged victim and her family or the community that was affected—directly or indirectly—by the criminal offense. In Islamic jurisprudence there are basically three types of crimes: (1) offenses against a person (homicide and bodily harm), (2) offenses against God (*hadd* crimes such as theft, highway robbery, unlawful sexual intercourse [*zina*], false accusation of unlawful sexual intercourse [*kazf*], and drinking alcohol), and (3) "residual" forbidden or sinful acts, as well as offenses against public order and state security requiring discretionary punishment (*ta'zir*).[1] In Islamic law, litigation had to be initiated by the claimant for all offenses against people and for some of the *hadd* crimes, such as false accusation of unlawful intercourse and theft. For instance, despite the fact that rape normally falls, in Islamic jurisprudence, under the rubric of unlawful sexual intercourse, it has also been considered "bodily harm" or an attack on property (virginity or sexuality/the body of the individual as property) that requires compensation and therefore it has also been considered among the crimes against a person. As a result, in rape cases, the injured party had to initiate the litigation.[2] Yet, administrative authorities and members of the community that were responsible for policing social mores also had the right to bring to court cases of offenses against public order and morality. The remaining *hadd* offenses (unlawful intercourse, highway robbery, and alcohol consumption), could also be brought before the court by the community and administrators. However, even in these cases, individuals often alerted local authorities to such crimes by lodging complaints and informing against others.[3]

1 According to some schools of jurisprudence, apostasy is also among the crimes against God. See, Peters, *Crime and Punishment in Islamic Law*, 64–65.

2 See, Peirce, *Morality Tales*, 217.

3 Ibid., 90.

The Ottoman courts before which people brought their litigation did not record people's emotions in the registers for the interest of the researchers of following generations. Rather the recording of cases had an internal legalistic logic that followed proper legal procedures to justify the end result.[4] Furthermore, the commonplace language for violence, sorrow, infidelity, and immorality were translated into legal court language such that the amorphous realities of life fit into the terminology of the legal norm. In fact, litigants' accusations were shaped or constructed through this legal vocabulary. Although people did not, of course, live through and think of their experiences in legal terms, the clients of the court had no option but to come to terms with the formal legal language before the court. In fact, it was not only the language that transformed their experience into litigation, but the engagement with the court also transformed their experience and themselves, as Chapter 2 and 3 explains in terms of petitioning being another form of this translation.

This section explores the terminology used for sexual offenses in the legal documents of the mid-eighteenth century, especially that used in legal practice in the local courts of Ankara and Bursa and in the Imperial Council. Since court records give us more details of the cases than the more formulaic and concise structure of the registers of the Imperial Council, in this chapter the analysis inevitably concentrates more on the former, though without neglecting the latter. *Fetva*s and petitions are also included in this analysis to probe the relationship between legal court language and popular legal knowledge and Islamic law. I also examine the criminal language of the law book of Süleyman I to see how the *siyasa* discretion of the Ottoman sultans was codified for social control of sexual order in previous centuries, and whether and how that *siyasa* authority was applied in the eighteenth century.[5] In the final analysis a comparison of the language of legal practice with the language of the normative law reveals how the use of these non-*shari'a* terms allowed the courts to overcome stringent rules of normative law and punish sexual deviance in more flexible ways in this particular locale and time.

4 Despite the fact that the end result, i.e., a judgment, was not always written in the records, depositions were recorded, especially in criminal cases, for possible future trials that might affect the outcomes.

5 It should be repeated here that we cannot assume that the *kanunname*s of the sixteenth century represent the *kanun* in the eighteenth century. The term *kanun* is used to refer to a larger politico-legal practice which was an amalgam of record-keeping and petitionary practices in the Imperial Council, as explained in Chapters 1 and 2, and a collection of the *siyasa* and *ta'zir* practices. However, since we have no penal law records for the eighteenth century, this book uses the sixteenth-century *kanunname* of Süleyman I as a rough guideline to understand, in principle, the outlook of the Ottoman *siyasa*.

The Ankara and Bursa court registers as well as Anatolian *Ahkam* registers that I analyzed for this study define most sexual offenses with a single term; indecent act (*fi'l-i şeni'*—فعل شني). One of the main questions of this chapter concerns the reasons the Ottoman courts preferred this term over the regular *shari'a* term, *zina*, to describe fornication, and/or of *livata*, for sodomy. Since *fi'l-i şeni'* did not strictly derive from the *shari'a* and *kanun*, it seems to have gradually become "legalized"; that is, it acquired the meaning of fornication and replaced the more strictly *shari'a* based term *zina* through legal practice in the Ottoman courts, especially after the sixteenth century. Given that *zina* and *fi'l-i şeni'* are both ambiguous and euphemistic terms that cover almost all sexual offenses, it is difficult, at first glance, to understand why the latter replaced the former in the court records. However, an analysis of the punishments imposed for such offenses, discussed below, offers us clues about the common utilization of the term in court practice.

The *shari'a* prescribed severe penalties and strict procedures for bringing evidence of *zina* and this, in fact, made it difficult to prosecute or punish. In the *shari'a*, the punishment for *zina* was lashing or stoning to death; according to Hanafi jurisprudence, the prosecution and conviction of the crime of *zina* required four male witnesses to the intercourse or the confession of the offender (four times). Fulfilling these requirements and therefore inflicting the penalty for *zina* was almost impossible according to *shari'a* rules. Thus, avoiding this *shari'a* specific term and instead using the still euphemistic term *fi'l-i şeni'* as we observe in eighteenth-century court practice provided legal authorities the flexibility to punish different sexual crimes by using the principle of *ta'zir*, that is to say, discretionary punishment.[6] In fact, freeing sexual offenses from the strict boundaries of *zina* by introducing in its place an ambiguous and euphemistic term (*fi'l-i şeni'*) seems to have made it possible to inflict punishments more effectively (see the examples in the following chapter).

The Hanafi jurisprudence followed by the Ottoman juridical curriculum in official *medrese*s and by officially appointed *kadı*s in the courts defined sexual crimes under the all-encompassing term *zina.* According to al-Marghinani (d. 1196), one of the most frequently referenced Hanafi jurists in the Ottoman lands, *zina* is defined as "the carnal conjunction of a man with a woman who

6 Semerdjian called our attention to the euphemisms used in the court language of Aleppo and Damascus, especially for moral violations. She has extensively discussed the use of other euphemistic terms for sexual indiscretion and concluded that using such non-legal terms served to loosen the criteria for prosecution. See Semerdjian, *"Off the Straight Path,"* 94–99.

is not his property either by right of marriage or of bondage."[7] The fact that crime is defined within terms of ownership, and thus that the woman and her sexuality is defined as property reflects the way in which jurists' normative definitions were in fact bound to the patriarchal norms of the society.[8] Semerdjian reminds us of the ancient and pre-Islamic character of these norms in the Mesopotamian legal traditions, and thus challenges the Orientalist image of the commodification of women under Islam.[9] As mentioned, *zina* belongs to the *hadd* crimes, as it is among the crimes specified in the Qur'an (4:15 and 24:1–2).[10] These crimes that are mentioned in the Qur'an, where a "fixed" punishment is specified, cannot be replaced by any other form of punishment. While the penalty of *zina* mentioned in the Qur'an is flogging (with a hundred stripes), the most controversial penalty of stoning the guilty person to death is prescribed in the hadith.[11] The civil status of the offender is an important determinant in the degree of punishment. In theory, if s/he were married, the penalty is death by stoning. A free unwed person receives one hundred lashes while a slave receives fifty.[12] In line with this principle, the Hanafi jurists, such as al-Halabi (d. 1549) whose *Multaqa al-abhur* was very influential in the Ottoman Empire, generally recommended flogging for unmarried offenders in varying degrees according to status and gender.[13]

Although in Islamic jurisprudence the punishment for *zina* was severe, the difficulty of obtaining a conviction neutralized its harshness. By stipulating rules of evidence that were extremely difficult to obtain, that is, the requirement of four male eyewitnesses to the intercourse, or the confession of the offender in the presence of the *kadı* on four different occasions, Hanafi jurists

7 al-Marghinani, *The Hedaya: Or Guide a Commentary on the Mussulman Laws*, ed. Charles Hamilton (Lahore, Pakistan: Premier Book House, 1963), as quoted in Semerdjian, *"Off the Straight Path,"* 17.

8 For specific examples of the interaction between the patriarchal social norms and the discourse of the jurists in Ottoman Syria and Palestine, see Tucker, *In the House of the Law*.

9 Semerdjian, *"Off the Straight Path,"* 18.

10 Tucker, *Women, Family, and Gender*, 184.

11 For detailed information on flogging and stoning in the Qur'an and hadith and the discussions concerning the issue, see ibid., 187–190; Semerdjian, *"Off the Straight Path,"* 20–28.

12 For a more detailed explanation on *zina* in Islamic and Hanafi law, see Imber, "*Zina* in Ottoman Law," 176–181; Rudolph Peters, "Zina," in *Encyclopaedia of Islam, Second Edition*, ed. P. Bearman, et al. (Brill Online, 2008); Joseph Schacht, "Zina," in *Encyclopaedia of Islam, First Edition*, ed. M.Th. Houtsma, J. Wensinck, and H.A.R. Gibb (Leiden: Brill, 1936); Schacht, *An Introduction to Islamic Law* (Oxford: Clarendon Press, 1964), 178–179.

13 Semerdjian, *"Off the Straight Path,"* 26.

aimed to prevent conviction.[14] Furthermore, since false accusation (*kazf*) of *zina* was itself punished by the infliction of eighty lashes, the *shari'a* also aimed to discourage those who might intend to accuse a person.[15] Furthermore, the presence of the principle of doubt (*shubha*), that is, the possibility of arguing that the act committed resembled a lawful one (marriage) so closely that s/he had acted in good faith, provided an easy escape from the accusation of *zina*.[16] Thus, Islamic jurisprudence did not seriously envision active prosecutions of illicit sex, but was concerned with maintaining social harmony and protecting the reputation of the individual in a gendered society of which the jurists were a part.[17] In this sense, Muslim jurists often left the issue of fornication either to the person's conscience, by leaving the responsibility for judgment to God or to private prosecution outside the legal sphere,[18] rather than considering it a "worldly" phenomenon that required public justice.

Yet political leaders could not easily leave public order and justice to the person's conscience or divine retribution. Ottoman sultans were not an exception in this sense. As discussed in Chapter 1, the promulgation of law books by the Ottoman sultans was an aspect of the deployment of *siyasa* discretion, and *zina* had a central place in the nexus of this criminal order. The most comprehensive law book of Süleyman I, that is, the "old Ottoman criminal code" as it is commonly called in Ottoman studies, was, in fact, an early-modern embodiment of "discretion." The restrictive aspects of the *shari'a*, such as special forms of evidence, witnesses, and confessions that basically hindered the punishment of *hadd* crimes, were modified through the enactment of new statutes. In penal law the purpose of these statutes was not to abolish or reject the *shari'a* provisions, but to supplement the *hadd* with more specific instructions regarding evidence, witnesses, and punishment.[19] It is especially evident when one

14 Hanafis imposed the most stringent requirements of confession and witnessing and increased the possibilities for retraction and doubt in *zina* cases. See Tucker, *Women, Family, and Gender*, 185–186.

15 Imber, "*Zina* in Ottoman Law," 176–177.

16 Tucker, *In the House of the Law*, 161. Tucker indicates that the standard of evidence was not very high: "Hanafis were willing to accept statements from the accused such as 'you married me' or 'I married her,' even though there had been no legal marriage, as sufficient for establishing *shubha*." Tucker, *Women, Family, and Gender*, 189.

17 Peirce, *Morality Tales*, 353–354; Tucker, *In the House of the Law*, 81, 156–161.

18 Imber, "*Zina* in Ottoman Law," 181–182.

19 For parallel arguments on the relationship between the *shari'a* and the *kanun* in penal law, see Gerber, *State, Society and Law in Islam*, 62; Semerdjian, *"Off the Straight Path,"* 33–37; Ze'evi, *Producing Desire*, 59–70.

looks at the chapters of the law book organized to deal with criminal topics for which the *shari'a* has stringent conditions and procedures.

The first chapter of the old Ottoman criminal code concerns unlawful sexual intercourse, slander, and similar offenses about which the *shari'a* has strict rules. The second chapter addresses provisions concerning homicide and bodily harm that were "crimes against person(s)" and according to the *shari'a* require punishments involving either retaliation (*kısas*) or financial compensation (*diyet*), but again with very stringent conditions for prosecution. The third chapter, on *hadd* crimes other than unlawful sexual intercourse and slander, dealt with theft, (highway) robbery, alcohol consumption, and other transgressions punishable under *ta'zir*. Finally, the last chapters dealt, though very briefly—with only six statutes—with investigation and criminal procedure.[20] All of these statutes in separate chapters evidently expanded on offenses that resembled *hadd* crimes, but did not necessarily include all elements of the strict *shari'a* definitions.

With regard to sexual transgressions, the old criminal code accepted the *shari'a* principle that *zina* is among the "crimes against God" and therefore receives a fixed (*hadd*) penalty, not be reduced, increased, changed or commuted by anyone. However, it did not confine its jurisdiction to the stringent rules of unlawful sexual intercourse (*zina*) as defined in the *shari'a*. Rather, it expanded the definition of sexual offenses to make their punishment more feasible and "worldly" by simplifying criminal trial procedure and by defining the specific penalty to be imposed for each misdemeanor.

While the *kanunname* accepted that *zina* requires a fixed penalty, it monetized the punishment of fornication by commuting the fixed penalties of the *shari'a* to a fixed scale of fines according the status of the perpetrator.[21] First, monetizing punishments was a source of revenue for the state, that is, income for the executive officials where the crime was prosecuted.[22] Furthermore, there were legal bases for commuting the prescribed *hadd* punishments to lighter penalties[23] and for preventing the conviction of *zina* in Hanafi jurisprudence as discussed. Heyd asserts that the opinion of Abu Yusuf, the pioneer eighth-century Hanafi jurist who stated that the ruler was allowed to "inflict discretionary punishment by taking money" (*al-ta'zir bi-akhdh al-mal*), was influential among Ottoman jurists. This principle was apparently applied in

20 Heyd, *Studies in Old Ottoman Criminal Law*, 54–131.

21 Articles 1–9 in ibid., 95–97.

22 Peirce, *Morality Tales*, 118, 324–326.

23 Semerdjian, *"Off the Straight Path,"* 31.

order to enable them to commute *ta'zir* punishments of flogging into fines.[24] In fact, there is a stipulation in the first article (on fornication and other offenses) of Süleyman's *kanunname* that the perpetrator should be fined, provided s/he does not suffer the death penalty even if the crime of *zina* is established according to the *shari'a*.[25] In that sense, the *kanun* articles on *zina* were in fact an application of the *ta'zir* principle that the perpetrator should be punished according to her/his status, in the event that the conditions of *hadd* are not established according to the *shari'a*.

Furthermore, the *kanun* modified the definitions and convictions of sexual offenses in a radical way by explicitly converting many of the sexual offenses to *ta'zir* crimes.[26] The "old Ottoman criminal law" did this in two ways: First, it modified the strict evidential conditions of the *shari'a* for the conviction of fornication and other sexual offenses. Second, it prescribed "discretionary punishments" for sexual crimes almost without exception, by introducing new principles, such as consent and violence, about which the *shari'a* was mostly silent.

With regard to the evidential amendment, the old criminal code accepted circumstantial and hearsay evidence for fornication,[27] and insisted on the evidence of four witnesses to the intercourse. In fact, this was also an extension of Hanafi jurisprudence, which allowed circumstantial evidence in proving sexual crimes. While al-Marghinani accepted circumstantial evidence for the proof of "whoredom," Peirce asserts that he did not define how this evidence works in practice.[28] Yet, circumstantial evidence provided, especially on a person's reputation, would result in *ta'zir* rather than *hadd* punishments of a sexual offense.[29] Ultimately, the actual act of sexual intercourse lost its centrality to the evidence and was replaced by any amorous association that was considered "illegal" by the community and thus could be treated as *zina*.

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24 Heyd, *Studies in Old Ottoman Criminal Law*, 280–281.

25 "Eğer bir kimesne zina eder görülse, şer'an üzerine sabit olsa, lakin ala vech'iş-şer' recm kılmalu olmasa" in Ahmet Akgündüz, *Osmanlı Kanunnameleri ve Hukuki Tahlilleri* (Istanbul: Fey Vakfı, 1992), 4:296. Also see Heyd, *Studies in Old Ottoman Criminal Law*, 95. Akgündüz interprets this stipulation as "not being able to establish the conditions of *hadd* crime of *zina*" in Akgündüz, *Osmanlı Kanunnameleri ve Hukuki Tahlilleri*, 4:296, n. 3.

26 In this sense, Ze'evi argues that the flexibility of the "sultan's law" in taking action in "imperfect cases" that do not meet the requirements for *hadd* convictions can be read as "an extension of the principle of discretionary punishment allowed by the şeriat in such cases." Ze'evi, *Producing Desire*, 60.

27 See Article 17 in Heyd, *Studies in Old Ottoman Criminal Law*, 99.

28 Peirce, *Morality Tales*, 132–133.

29 Peters, *Crime and Punishment in Islamic Law*, 15–16; Semerdjian, *"Off the Straight Path,"* 97.

Parallel to this, the intent to commit fornication was considered a sufficient motive to incur punishment, at least in certain cases such as "breaking into another person's house" on the assumption that the accused would commit fornication with the other man's wife.[30] In fact, intent (*kasd* or *qasd*) is one of the essential requirements of the application of legal punishment according to Muslim jurists.[31] Semerdjian suspects that Ottoman legal reasoning on intent may have been founded upon a specific Hanafi interpretation of Islamic law based on al-Marghinani's broader definition of *zina*.[32] Yet, she also calls our attention to the fact that "the notion of intent as a necessary component of guilt is found more often in the *kanunname*s than in other sources of Islamic law and is used more often as evidence toward indictment."[33] In other words, the notion of intent, as the necessary and sufficient component of finding a criminal guilty becomes a prominent *kanun* principle to enable the punishment of offenses unproven due to lack of physical evidence.[34] Thus, the *kanun* opens up a large avenue to the possibility of punishing those who have "evil" intentions, without necessarily requiring evidence that the event was committed. In this sense, speculation of criminal activity and/or suspicion of *zina* are considered evidence of guilt according to the *kanun*.[35] This also shows the considerable weight that the Ottoman legal outlook and the *kanunname*s gave to the testimony of the community in court trials and thus in scrutinizing public morality.[36]

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30 Imber, "*Zina* in Ottoman Law," 184–185.

31 The offender must possess two more capacities: the power (*qudra*) to commit or not commit the act and knowledge (*ilm*) that the act was an offense. Peters, *Crime and Punishment in Islamic Law*, 33. Even though the jurists seemed to have assumed that the violation of *hudud* restrictions was necessarily an intentional act, they also accepted two exceptions to the general disregard of intention, that are, mistaken acts and ignorance of the law. Paul R. Powers, *Intent in Islamic Law: Motive and Meaning in Medieval Sunnī Fiqh* (Leiden and Boston: Brill, 2006), 190–191.

32 Semerdjian, *"Off the Straight Path,"* 44.

33 Ibid., 42.

34 For a detailed discussion of intention in the sixteenth-century Ottoman *kanunname*s and *fetva*s, see Semerdjian, "Gender Violence in Kanunnames," 193–196. For divergent opinions on intent among the Muslim jurists as well as the role of intent in modern *shari'a* courts in Yemen, see Brinkley Messick, "Indexing the Self: Intent and Expression in Islamic Legal Acts," *Islamic Law and Society* 8, no. 2 (2001).

35 Semerdjian, *"Off the Straight Path,"* 43.

36 Ze'evi identifies the central role the community (i.e., villages, town quarters, and households or extended family structures) played in policing morality as one of the important distinctions between the *kanun* and the *shari'a*. Ze'evi, *Producing Desire*, 60. For similar thoughts in the exceptional role of the community, especially in the administration of

The punishment of intent, not (yet) the act itself, relates to the political power's consciousness of the importance of preventing epidemic sexual violence in the lands of the empire. As intent played an important role in the sixteenth-century *kanunname*s, violent acts or non-consensual sexual contacts occupied a prevalent space compared to incidents as defined by Islamic jurisprudential texts.[37] While Islamic jurisprudence generally assumes that *zina* is a mutually consensual act, the *kanun* was very conscious of non-consensual sexual deeds that can threaten public order.[38] Thus, new sexual offenses that were not discussed in the *shari'a* were introduced by the old criminal code and these incurred discretionary punishment with no exception. These included the abduction of women or boys for sexual purposes (the punishment was castration),[39] breaking into a house with the intention of fornication (punished by a fine),[40] and sexual molestation (of a man's daughter, son, or wife) such as touching, looking, and verbal assault (the punishment was chastisement and a fine).[41] The fact that the punishment prescribed for (non-consensual) assaults (chastisement) was harsher than that of (consensual) fornication (fine) also implies this consciousness of the threats to public order. As explained in Chapter 3, abduction and its various forms was criminalized in *kanunname*s from early on and penalized by severe corporal punishment, either castration or the bastinado.

Despite the fact that rape as such was not included among the crimes of sexual assault, it was, in fact, implied in the old criminal law in the following statute:[42]

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public morality in the Ottoman legal system, see Semerdjian, *"Off the Straight Path,"* 43, 61–63, 82–86; Peirce, *Morality Tales*; Marcus, *The Middle East on the Eve of Modernity*; Ergene, *Local Court, Provincial Society, and Justice*; Ergene, "Why Did Ummu Gulsum Go to Court"; Başaran, *Selim III, Social Control and Policing in Istanbul*.

37 Semerdjian, *"Off the Straight Path,"* 39–40.

38 Peirce, "Domesticating Sexuality," 109, 131.

39 Article 10: "Furthermore, a person who abducts a girl [or] boy or enters [another] person's house with malice, and a person who joins [him as an accomplice] for the purpose of abducting a woman or girl shall be castrated by way of punishment," in Heyd, *Studies in Old Ottoman Criminal Law*, 97.

40 Article 9: "If a person enters [another] person's house with intent to commit fornication, he shall, if he is married, pay the fine [imposed] on a married [fornicator]; if he is unmarried, he shall pay the fine [imposed] on an unmarried [fornicator]," in ibid.

41 Articles 18–21 in ibid., 99–100.

42 Semerdjian states that the sixteenth-century *kanunnames* were still in search of a language for rape and therefore dealt with the issue of rape euphemistically. Semerdjian, *"Off the Straight Path,"* 39.

> If a person enters a woman's house or approaches her on her way and cuts off her hair or takes away her garment or kerchief, [thus] offering [her] a gross indignity, the cadi shall, after [the offense] has been proved, chastise [him]; he shall also have [him] imprisoned and submit [a report] to the Sublime Court.[43]

The severity of the punishment, i.e., chastisement and imprisonment (both discretionary punishments), and the necessity of sending a report to the Imperial Council, imply that rape was treated differently from other sexual assaults. It should be noted that the severity of the sexual crime required the attention of the central government, as I explain in more detail in my analysis of eighteenth-century legal documents.

Finally, apart from these amendments, which modified the strict procedures of the *shari'a* and definitions of sexual offenses that opened the way to penalize fornication, the old criminal code also prescribed other forms of discretionary punishment for sexual offenses. Some other *shari'a* defined crimes were also subject to discretionary punishments. For example, in the old criminal code, sodomy and bestiality, which in the *shari'a* are sexual offenses, incurred discretionary chastisement in addition to a fine.[44] Last but not least, false accusation of unlawful intercourse (as defined by the *shari'a*), and other forms of slander or cursing with sexual connotations were also subject to discretionary punishment in the form of chastisement and fines of varying severity. In sum, by using the principle of *ta'zir* that was already granted to the sovereign by Islamic law, Ottoman political power opened a larger area to penalize sexuality through the *kanun.*

Tracking this penal establishment in normative law does not, of course, help us understand how sexual crimes were punished at the time these criminal codes were issued, or, more importantly for our purposes, in the eighteenth century. However, it gives us an idea about the ways in which criminalization and the penalization of sexuality took place in the process of consolidating the empire. By identifying the attempts of the Ottoman state to extend definitions and punishments on the basis of the principle of "discretionary punishment"

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43 Article 21 in Heyd, *Studies in Old Ottoman Criminal Law*, 100. "Eğer bir kişi bir avretin evine girip veya yoluna varub saçın kesüb <veya donun veya destarın alsa> hakaret eylese ba'de's-sübut kadı ta'zir idüb dahi habs itdürüb Dergah-ı Mu'allaya arz ide," ibid., 61.

44 Articles 28 and 32–34 in ibid., 102–103. While Selim's *kanunname* only criminalized the sodomized, Süleyman's lawbook penalized the sodomizer himself with *zina* fines. Peirce, "Domesticating Sexuality," 117, 127–128.

we can establish an idea of how this "discretion" was deployed in the context of the eighteenth-century Ottoman Empire.

As mentioned, the term *fi'l-i şeni'* (indecent act) was the most commonly utilized euphemism replacing *zina* in the Ottoman courts of Bursa and Ankara and in the Anatolian petitionary registers of the eighteenth century. In this chapter I argue that *fi'l-i şeni'* was the formula for converting the *hadd* crime of *zina* into various sexual offenses punishable by *ta'zir*. In other words, the changes in the sixteenth-century lawbooks that brought about the penalization of sexual crimes through the discretionary authority of the politico-legal power was fulfilled through the utilization of this relatively new term that emerged in legal practice after the sixteenth century.

The term *fi'l-i şeni'* does not seem to originate from Islamic jurisprudence or *kanun* language. While linguistically its Arabic roots are clear, the question of whether it has legal roots in Islamic law is not. Pakalın's *Dictionary of Ottoman Historical Expressions and Terms* defines the term as "an expression concerning molestation against honor" and adds that "it does not necessarily mean sexual intercourse (copulation)."[45] In a modern dictionary of Islamic legal terms, *fi'l-i şeni'* has been defined as an "extremely repugnant, very bad act; ravishment."[46] While Faranciszek Meninski's famous *Lexicon Turcico-Arabico-Persicum* published in 1680[47] does not include the term, a French/Ottoman Turkish judicial dictionary published in the late nineteenth century in Istanbul does use the term *fi'l-i şeni'* as an alternative meaning for *adultère*.[48]

Among the accusations and grievances most often described as *fi'l-i şeni'* in the court records of Bursa and Ankara and the petitions sent to the Imperial Council in the mid-eighteenth century, the most common complaint was breaking into and entering people's houses, and assaulting or raping women and "virgin" girls. In such cases, litigants were mostly males related to the alleged victims by kinship or ownership: most of the time the husband[49] and sometimes the father-in-law[50] of the woman if she was married; the father

45 "Irza vuku bulan tasallut hakkında kullanılır bir tabirdir. Bununla beraber mutlaka cima' manasına değildir." Mehmet Zeki Pakalın, "Fi'l-i Şeni'."

46 Mehmet Erdoğan, "Fi'l-i Şeni'," in *Fıkıh ve Hukuk Terimleri Sözlüğü* (Istanbul: Rağbet Yayınları, 1998).

47 Meninski, *Thesaurus Linguarum Orientalium Turcicae-Arabicae-Persicae*.

48 Nazaret Hilmi, *Termes Judiciaires, Istılahat-ı Adliye* (Istanbul: Karabet ve Kasbar Matbaası, 1304/1887).

49 For examples of such litigation initiated by husbands, see BCR, B166, 35A/2; BCR, B166, 35A/3–35B/1; ACR, 121, 264; ACR, 121, 120; BOA, Anadolu Ahkam Defteri 3, case 494; BOA, Anadolu Ahkam Defteri 3, case 217 and BOA, A.DVN.ŞKT, folder 3, petition 32.

50 BOA, Anadolu Ahkam Defteri 1, case 399.

if she was an unmarried "virgin" girl[51] or her male owner if she was a slave (*cariye*).[52] The profile of the litigants in that society makes the patriarchal understanding of "ownership" explicit. In addition, we find rare court trials and cases in which women themselves initiate petitions related to such attacks (on women in their own houses). For example, a certain Zeynep sued a man in the Ankara court for breaking into the house in which she resided with her father, and for slandering her by accusing her of committing *fi'l-i şeni'* with him and deflowering her virginity.[53]

Moreover, we must not forget the large number of complaints against the habitual general, and sometimes generic, violence of certain "bandits" who broke into houses, and attacked and/or violated women and children. These complaints were generally submitted by the community, i.e., the inhabitants of a certain neighborhood, village or town. If a specific crime, such as assault, rape or murder of a certain woman, or man, in the vicinity was mentioned explicitly, then the complainants included the alleged victim or her family.[54]

The second set of accusations most frequently brought to courts concerned the kidnapping of women and girls, "marrying them by force" (*cebren nikâh*) or "marrying (them) over another marriage" (*nikâh üzerine nikâh*), as explained in Chapter 3. These expressions do not refer to polygamy, as it may suggest. Rather, it implies that a married woman was abducted by force or escaped from her current husband, by consent, to marry someone else. For example, a husband petitioned the Kütahya governor, and claimed that a man abducted his wife just after their wedding night and married her by force.[55] Similarly, a man from Kastamonu requested an imperial decree be addressed to the Kütahya governor and the judge of Kastamonu concerning the punishment of a man "from among the usurpers" who abducted and married his wife to one of his

51 BOA, Anadolu Ahkam Defteri 3, case 501 and BOA, A.DVN.ŞKT, folder 4, petition 29.

52 BCR, B121, 33; BOA, Anadolu Ahkam Defteri 3, case 637; BOA, Anadolu Ahkam Defteri 3, case 152.

53 ACR, 122, 94. While we can count this incident among the accusations initiated by women themselves of "breaking into the house and assaulting women," since it was a *kazf* (false accusation of unlawful intercourse) accusation, according to Islamic law, the trial ought to have been initiated by the victim anyway. For another case of litigation initiated by a woman, which could be counted among such offenses as "assaulting women in their house," see ACR, 121, 265.

54 Some examples of these can be found in BOA, Anadolu Ahkam Defteri 3, cases 27, 118, 152, 288, 356, 447, 620, 637 and BOA, Anadolu Ahkam Defteri 1, cases 263, 328, 343. Also see Chapter 3 for a more detailed analysis of such "banditry" cases.

55 BOA, A.DVN.ŞKT, folder 56, petition 81.

FIGURE 4.1 *Executing men, abducting (saving?) women in raid of Halu by the Crimean troops.* Nusretname *(c. 1584), Mustafa Ali.*
TOPKAPI PALACE MUSEUM LIBRARY, H 1365, FOLIO 161A.

servants.[56] Although there are many cases of marriage conflicts in the court records of Ankara and Bursa, the kinds of offenses defined as "marrying by force" and "marriage over marriage" were mostly encountered in the *Ahkam* registers and among the petitions sent to Istanbul, as explained.[57] Predictably, such cases were brought by the husbands of the women or their fathers. The concentration of such abduction cases in petitions sent to the Imperial Council or governors shows us once more that these sexual assaults were interconnected with the disturbance of social order in the eyes of both Ottoman subjects and the central administration, as we have seen in the symbolic relationship between banditry and sexual violence in the previous chapter.

In such cases, the use of the toned-down term "indecent act" was "enriched" in court records by attaching extra epithets or phrases to it, such as "forcefully" (*cebren fi'l-i şeni'*) or "assault with the intention of" (*fi'l-i şeni' kasdıyla taarruz*). However, even such additions are very brief and do not come close to covering the varieties of violence seen in everyday life. Assaults against women and girls were generally described in the legal documents of the eighteenth century as either "assault with intent to do *fi'l-i şeni'*" (*fi'l-i şeni' kasdıyla taarruz*)[58] or "assault with the intention of defloration" (*bikrini izale kasdıyla taarruz*).[59] In assault incidents records sometimes replaced the specific term *fi'l-i şeni'* with an even more euphemistic expression like *sû-i kasd* (bad intention).[60] Petitions also adopted the same legal language that was used by the local courts and the Imperial Council[61] for such sexual offenses as we observed in the usage of "violation of honor" (*hetk-i ırz*). For example, Hüseyin wrote a petition against the men who "broke into his house and intended to commit *fi'l-i şeni'* with his virgin daughter and his family."[62]

Apart from these oft-repeated themes of illicit offenses, cases with more individual characteristics were also registered in the courts with the same

56 BOA, A.DVN.ŞKT, folder 67, petition 133.

57 BOA, A.DVN.ŞKT, folder 1, petition 90; BOA, A.DVN.ŞKT, folder 2, petition 32; BOA, A.DVN.ŞKT, folder 3, petition 80; BOA, A.DVN.ŞKT, folder 4, petition 124; BOA, A.DVN.ŞKT, folder 56, petition 44; BOA, Anadolu Ahkam Defteri 3, case 7; BOA, Anadolu Ahkam Defteri 3, case 312; and BOA, Anadolu Ahkam Defteri 3, case 494.

58 BOA, Anadolu Ahkam Defteri 3, case 637; ACR, 121, 58; and ACR, 121, 265.

59 BOA, Anadolu Ahkam Defteri 3, case 501.

60 "... nam hatuna sû-i kasd ile taarruz idüb...," ACR, 121, 264; "... zevcem ... hatuna sû-i kasdıyla menzilime duhul...," ACR, 121, 120.

61 This aspect of petition writing was explored in more detail in Chapter 2.

62 "menzilime girüb ve ehlimi fi'l-i şeni' ve bakire kızımı fi'l-i şeni'e kasd...," BOA, A.DVN.ŞKT, folder 4, petition 29. For another petition which used this term for assaults against women, see BOA, A.DVN.ŞKT, folder 2, petition 32.

terminology. One of the most serious offenses among these was, of course, rape. It is noteworthy that rape accusations were described in more detail, by incorporating the litigants' accounts in an extended way, as compared to other cases. Therefore, they were translated into court language in a less summary way. For example, the litigation concerning the rape of a couple's female servant was recorded as "the above-mentioned men raided us with weapons, abducted our [virgin] servant by force, brought her to the forest and deflowered her."[63] Another rape offense was described in the Anadolu *Ahkam* registers in a way that sounds almost like a direct narration of the event by the litigants: "the aforementioned men bound her hands and ankles in their house and let their son have his way with the aforementioned girl."[64] Even if the incident was not described in detail, records explicitly indicated the "forced" character of *fi'l-i şeni'* if there was a rape accusation.[65] Finally, the term forcible fornication (*cebren zina*—جبراً زناء), which was frequently used in the Ottoman *fetva*s of the eighteenth century as well as in earlier periods,[66] seldom replaced the term *fi'l-i şeni'* in the court records. For example, in the Ankara court records of March 1742, a certain Saime's accusation against Nasuh for raping and deflowering her was described as "he did forcible *zina* on me and violated my virginity in his house."[67]

Although the offense of rape overlaps with our first category, that is, breaking into houses and assaulting women, rape can be analyzed separately since it was categorically different from the rest in several ways. First, in some cases the place where the sexual offense occurred varied. Women and men explicitly identified the place where the alleged rape happened; it was generally outside their own house. For example, in Saime's accusation against Nasuh, the rape is explicitly mentioned as taking place in his house—though the register did not explain why she was there.[68] Similarly, a certain Elif from Ankara claimed that İsmail Beşe invited her to his house and attempted to rape her there six

63 "mezburun alet-i harb ile gelüp bizi basub bigayri hak Ayşe nam bikr cariyemizi cebren alub ormana götürüb bikrini izale itmişlerdir deyü," BCR, B121, 33. Note that the document specifically mentioned the act of "deflowering" when a "virgin" girl was concerned.

64 "… nam kimesneler mezburenin ellerin ve ayakların bağlayub oğullarını mezburenin üzerine bırakub," BOA, Anadolu Ahkam Defteri 1, case 399.

65 "bana cebren fi'l-i şeni' itmişdir, sual olunub…," ACR, 122, 51; "bana sû-i kasd ile taarruz… itmekle…," ACR, 121, 152.

66 For the use of the term in Ottoman *fetva*s of the sixteenth century, see Imber, "*Zina* in Ottoman Law," 190–206. I also discuss the *fetva*s in certain *fetva* collections of the eighteenth century in the current and following chapters.

67 "…bana menzilinde cebren zina ve bikrimi izale itmekle…," ACR, 121, 125.

68 ACR, 121, 125 (20 Muharrem 1155/26–27 March 1742).

months earlier. When İsmail invited her to his house again, the day before 26 April 1742, she decided to sue him.[69] In August 1743 another woman called Emine accused a certain Seyyid Ebubekir Çelebi of raping her when she went to his dwelling in connection with her work selling Angora wool.[70] Specifying the place where the rape occurred (generally outside the women's home) was of course to differentiate rape, from a legal point of view, from the crime of "breaking into the house."

Such a differentiation may also reflect a socio-moral distinction with implicit gender norms: being outside the home and being assaulted may imply a lower or at least suspicious moral status for the female victim in the eyes of the society; therefore the register reflects this suspicion in its minute attention to place. In fact, a considerable number of sexual assault and rape accusations in the Ankara and Bursa court records brought before the court by women or their guardians were dropped due to the difficulty of proving them. Interestingly enough, in all of the following instances in which women made accusations of rape that took place at the house of the accused man, the women's allegations were denied by the court due to "lack of evidence." This common outcome, to the disadvantage of the women, implies a patriarchal perception on the part of the court toward women going "out" of their home.

In her accusation of rape, Emine could not produce evidence against İsmail, who took an oath on his innocence and whose good repute was testified to by witnesses.[71] Similarly, Saime's lawsuit against Nasuh for raping her in his house, mentioned above, was dropped when she could not provide proof.[72] A woman and two adult virgin girls alleged that a certain man had entered their house and assaulted them; the petition was thrown out because they were unable to prove their case, even though two male proxies represented them in court.[73] The case of one man, who applied to the Ankara court with an allegation against two men who entered his house and attempted to assault his wife, was dropped by the court as a result of his inability to provide proof in the face of the accused man's denial, even though he did not have a character witness or swear an oath.[74]

Besides the importance of the diverse locations where the incidents occurred, rape was also considered somewhat distinct from other *zina* offenses

69 ACR, 121, 152 (20 Safer 1155/26 April 1742).

70 ACR, 122, 51 (Cemaziye'l-ahir 1156/August 1743).

71 ACR, 121, 152 (20 Safer 1155/26 April 1742).

72 ACR, 121, 125 (20 Muharrem 1155/26–27 March 1742).

73 BCR, B166, 3B/3 (Rebiü'l-evvel 1154/May 1741).

74 ACR, 121, 120 (10 Muharrem 1155/17 February 1745).

in Islamic law. It acquired a status between the category of "crimes against a person" and that of "crimes against God."[75] As a result, the litigation had to be initiated by the alleged victim. In fact, we observe a more personal character in rape accusations because they were initiated by the women themselves rather than by members of the community or family. In Islamic law it is the litigant's responsibility to prove her/his accusation, therefore, a more detailed and personal narration of the case was to the advantage of the rape victim, in spite of the difficulty of narrating such a traumatic event. Furthermore, the rape victim would demand and specify the punishment for the offender and the payment of compensation (*diyet* in Turkish, *diya* in Arabic).[76] A detailed description of the event by the victim also helped in determining the degree of punishment and amount of compensation the guilty party should receive.

While the *kanunname* of Süleyman I had separate clauses for the "abduction of women and girls," "entering another's house for that purpose" and "forcibly marrying them,"[77] as discussed, it remained blind to the possibility of rape that took place under different circumstances and in places outside people's own houses.[78] Thus, emphasizing the forcible character of the act and describing the event in detail might have been a legal necessity that arose from the lack of a corresponding notion in normative law, either in Islamic jurisprudence or in the Ottoman *kanun*.

Finally, there is an interesting accusation against a runaway wife by her neighbors in Bursa.[79] The case is exceptional in the sense that it was brought to the court not by the husband, but by the community. The residents of Sırma village of Bursa asked in their litigation that the woman called Raziye, the wife of Safer Elhac Hüseyin, who ran away with a couple of "bandits" and was found in another village two or three days later, be banished from their village. In their litigation, they blamed Raziye for "not abstaining from rascals and bandits," and reported that she was found in a meadow a couple of days after she escaped from home in the middle of the night. The community considered

75 See Chapter 2, n. 69.

76 Sonbol, "Rape and Law in Ottoman and Modern Egypt," 219.

77 Articles 9, 10, 11, 12 in the *Kanunname* of Süleyman I in Heyd, *Studies in Old Ottoman Criminal Law*, 97–98.

78 Although the consent of the woman and girl was mentioned in some of the clauses in Süleyman's *kanunname* such as Article 9, which suggests that *kanun*-makers had a notion of non-consensual sexual intercourse, there is neither a specific clause on rape nor the possibility of the occurrence of such a sexual abuse in places other than the woman's own house. For Article 9, see ibid. Peirce calls our attention to this "elitist bias" of the normative law. See, Peirce, *Morality Tales*, 6–7.

79 BCR, B121, 110 (14 Rebiülevvel 1156/8 May 1743).

Raziye a threat to the social and gender order of the society, even if her husband did not complain of her behavior, at least not in legal terms. Since policing the moral order of the quarter or the village primarily belonged to the community,[80] the "indecent act" was reported by the community.

Yet women were not the only victims of sexual assault. Men were also subjected to sexual assault, and either they themselves or their relatives filed lawsuits in the courts. Interestingly enough, assaults against men were also described—both in court records and petitions—by the term *fi'l-i şeni'* ("forced"), rather than the more legalistic term *livata*, which is used for sodomy in Islamic law manuals and *fetva* literature.[81] For example, a certain es-Seyyid Mustafa sued Ali before the court in Ankara for attacking, hitting, and forcefully committing an "indecent act" with him.[82] Another example of a sodomy case was described as "forced" *fi'l-i şeni'* in a letter written by the *kadı* of Bursa to the local janissary officer requesting the execution of the two men/"bandits" who raided a bakery and committed sodomy there with a certain Abdullah.[83]

Finally, in some litigation concerning public morality, especially that which relates to women who "intermingle with men," the term *fi'l-i şeni'* was used specifically to refer to the undesirable deeds of the ones who committed the "act."[84] Most of the time these cases were brought before the court by the inhabitants of the town and sometimes by the public authorities who were responsible for policing the neighborhood.[85] (See Figure 4.2) Among the cases against public morality, the most frequently encountered complaints the

80 This is explained in more detail in the following pages in relation to discussions of communal solidarity and responsibility.

81 "…Abdurrahman nam kimesneyi cebren fi'l'i şeni' itmeleriyle…," BCR, B121, 38; "…Kara Ahmed bana fi'l'i şeni' kasdıyla taarruz eyledi deyü…," BOA, A.DVN.ŞKT, folder 3, petition 42; and ACR, A121, 159.

82 "…mevzi-i mezburda beni haz ve yumruk ile arkama darb ve cebren bana fi'l'i şeni' eyledi sual olunub…," ACR, 121, 159 (24 Safer 1155/29–30 April 1742).

83 "…dükkanını dört nefer refikalarıyla basub mezbur Abdurrahman nam kimesneyi cebren fi'l-i şeni' itmeleriyle…," BCR, B121, 38 (6 Rebiü'l-ahir 1155/9–10 June 1742). This letter (*i'lam*) constitutes one of the rare examples in which we can clearly see the relationship between the judicial and executive branches of the early-modern Ottoman legal system. I discuss the importance of this relationship as it pertains to the rarity of punishment in the court records.

84 ACR 121, 86 and ACR 121, 37 (5 Şevval 1154/14 Aralık 1741).

85 For an example of those brought by the public authorities, see BCR, B166, 17B/2 for those women who were caught by the police (*kolluk*) while committing fornication (*fi'l-i şeni'*) with some men in a boathouse.

FIGURE 4.2 *Lovers in a waterfront garden arrested by soldiers.*
TOPKAPI PALACE MUSEUM LIBRARY, ALBUM OF AHMED I, B 408, FOLIO 20B.

community faced were those of certain women intermingling with men, inviting them to their houses, drinking, and making "mischief" (*fisk*) with them. In those cases, the "indecent acts" that took on sexual connotations were generally coupled with other terms that stigmatized a woman morally; for example, it was alleged that she had *sû-i hal* (bad affairs), she was *fasika* (mischief maker), and she did "not avoid the other sex" (*namahremden ictinab itmediğinden*).[86] The community, i.e., local residents, had the right to lodge an objection with the *kadı* if they did not want someone living in their neighborhood, even though a specific offense could not be directly associated with the person accused.[87]

There were various reasons behind the community's active involvement in litigation concerning public order. First, the community, which was loosely defined as the "residents" of a neighborhood or town, was the main body of

86 ACR, 121, 86 and ACR, 121, 37.

87 Article 124 in Heyd, *Studies in Old Ottoman Criminal Law*, 130; Peters, *Crime and Punishment in Islamic Law*, 87.

social control that most often cooperated with the local court, which agreed with its moral codes.[88] Moreover, the residents of the neighborhood had their own means of establishing law and order even though they did not have the same official authority to enforce it and punish offenders as did the courts.[89] The principle of collective responsibility that originated from the idea of *qasama* in Islamic law played an important role. *Qasama* established collective liability for cases of homicide committed in a neighborhood or village by an unknown perpetrator.[90] Collective responsibility was an established principle in Ottoman law books of the sixteenth century; in these cases the entire locality or group was held responsible for any crime that was not reported or was covered up.[91]

In a village in Kastamonu we find a complicated example of "collective responsibility." Its residents submitted a petition to the Imperial Council in 1742 to lodge a complaint against a man called Rıfkıoğlu who fraudulently obtained money (with the help of certain state officials) from some of the residents, on the pretext that one of their fellow townsmen attacked him with the intention

88 Ronald Jennings calls this phenomenon "the precept of prosecution by the people," and considers it a combination of *de facto* and *de jure* prosecution by the people. Jennings, "Limitations of the Judicial Powers," 272.

89 There was, for example, a semi-official form of communal conflict resolution, i.e., *sulh* (amicable settlement). For a detailed analysis of amicable settlement cases in Üsküdar and Adana court records in the eighteenth century, see Tamdoğan, "Sulh and the 18th Century Ottoman Courts of Üsküdar and Adana." For a discussion of how *sulh* was actually a part of the court process through a specific rape incident in eighteenth-century Kastamonu, see Boğaç A. Ergene, "Why Did Ummu Gulsum Go to Court." For a discussion of *sulh* in Islamic law, also see Othman, "And the Sulh is Best."

90 For *qasama* in different schools of Islamic law, see Peters, *Crime and Punishment in Islamic Law*, 16–19.

91 See Article 77 in the criminal code of Süleyman I in Heyd, *Studies in Old Ottoman Criminal Law*, 115. For various views on the effect of strong or weak Ottoman administration on communal solidarity in policing public morality, see Marcus, *The Middle East on the Eve of Modernity*, 116–117. For the consideration of strong communal solidarity as an outcome of the community's fear of a strong administration in eighteenth-century Aleppo, see Rafeq, "Public Morality in 18th Century Ottoman Damascus," 181, 190. For an explanation of communal solidarity as a result of a weak administration, lack of security, and the corruption of Ottoman officials in eighteenth-century Damascus, in the current study, in line with the studies of Semerdjian, Peirce, and Zarinebaf, I am inclined to see communal control not as an "outcome" of state policies, but an independent early-modern form of communal power, one that was utilized and integrated into the legal mechanisms to enforce public order. See Semerdjian, *"Off the Straight Path,"* 81–84; Peirce, *Morality Tales*, 90; Zarinebaf, *Crime and Punishment in Istanbul*, 130–132.

of *fi'l-i şeni'*.[92] In this case it seems that the principle of collective responsibility worked not through the legal process, but was settled out of court. Rıfkıoğlu deemed the community responsible for the alleged sexual crime committed against him by one of their fellow townsmen. It is not possible to know from the available data why the perpetrator of the alleged crime did not pay the fine or was not brought before the court for trial. However, it is evident that Rıfkıoğlu blamed the community for failing to report it, and for covering it up or protecting the alleged criminal. In spite of the illegal character of the fraud, the basis of the case, i.e., the collective responsibility, was a legal one, albeit inspired by customary practices.

The above-mentioned litigation offers examples of *fi'l-i şeni'* cases from the court records of Ankara and Bursa, the petitions of Ottoman subjects, and imperial decrees registered in the Anatolian petitionary registers of the mid-eighteenth century. On the one hand, the term *fi'l-i şeni'* was not an invention of the eighteenth-century legal practice of the courts. It was first used in various courts in the sixteenth century.[93] On the other hand, the classical term *zina* continued to be utilized in court language to refer to adultery, fornication, and rape, at least in certain regions of the empire during the sixteenth century.[94] However, the "old Ottoman criminal law" of Süleyman I from the

92 BOA, A.DVN.ŞKT, folder 3, petition 42 (1155/1742).

93 There are a significant number of *fi'l'i şeni'* cases in the court records of Istanbul, Eyüp, Galata, and Rumeli from the mid sixteenth century to the late seventeenth century. For some examples, see ÜCR 26, 445, Rıfat Günalan (ed.), *İstanbul Kadı Sicilleri Üsküdar Mahkemesi 26 Numaralı Sicil* (*H. 970–971/M. 1562–1563*) (Istanbul: Türkiye Diyanet Vakfı İslâm Araştırmaları Merkezi (ISAM), 2010), 7:236. ECR 82, 45; ECR 82, 46 Talip Mert and Rıfat Günalan (eds.), *İstanbul Kadı Sicilleri Eyüb* (*Havâss-ı Refîa*) *Mahkemesi 82 Numaralı Sicil* (*H. 1081/M. 1670–1671*) (Istanbul: Türkiye Diyanet Vakfı İslâm Araştırmaları Merkezi (ISAM), 2011), 29:68–69., BACR 3, 528; BACR 3, 788. Rıfat Günalan (ed.) *İstanbul Kadı Sicilleri Bâb Mahkemesi 3 Numaralı Sicil* (*H. 1077/M. 1666–1667*), vol. 17 (Istanbul: Türkiye Diyanet Vakfı İslâm Araştırmaları Merkezi (ISAM), 2011), 17:442, 622. There are cases from the late sixteenth century (357, 654, and 1746) in which *fi'l'i şeni'* was used in the Ankara court records. See, Halit Ongan, *Ankara'nın İki Numaralı Şer'iye Sicili* (Ankara: Türk Tarih Kurumu Basımevi, 1974), 357, 654, and 1746 respectively. For an example of an imperial decree that used the term in the sixteenth century, see the decree from *Mühimme* Register 7 in Hikmet Turhan Dağlıoğlu, *1558–1589 Onaltıncı Asırda Bursa* (Bursa: Bursa Vilayet Matbaası, 1940), 83.

94 Peirce demonstrates that the term *zina* was widely used in the Aintab court in the sixteenth century. Peirce, *Morality Tales*, 352–353. She also mentioned, in our personal conversations, that the term *fi'l-i şeni'* was never used in the Aintab court.

sixteenth century did not use *fi'l-i şeni'*, rather it continued to use the term *zina* in conformity with the terminology of Islamic jurisprudence.[95]

There seems to have been a gradual increase in the utilization of the term *fi'l-i şeni'* in legal practice. Whereas *fi'l-i şeni'* was not firmly established as a term replacing *zina* in the Ottoman legal language of the sixteenth century, it apparently started to replace the term to refer most sexual crimes during the seventeenth century, as we can observe from the Istanbul registers.[96] While the term *zina* was still used in the court records of Üsküdar during the sixteenth century, it almost fades away and seems to have been replaced by the term *fi'l-i şeni'*, as the preferred term in the seventeenth-century records.[97] Finally, my observations on the Ankara and Bursa court records as well as the Imperial Council registers and petitions from the mid-eighteenth century indicate that the term was firmly established in legal practice by the eighteenth century.

95 See Heyd, *Studies in Old Ottoman Criminal Law*, 56–64, 95–103. However, we should also note that *kanun* adds not only different new expressions, but also new clauses derived from customary law.

96 ISAM's (*İslam Araştırmaları Merkezi*) transliteration project of forty court records of the Istanbul region (i.e., Istanbul, Üsküdar, Rumeli, Balad, Hasköy, and Bâb courts) in their entirety from the sixteenth to the seventeenth centuries gives us an opportunity to observe the terminology used in legal practice for sexual crimes over a rather longer period of time, albeit regionally bound. These forty volumes include registers kept between 1513 and 1738.

97 While 16 volumes of the forty transcribed registers belong to the sixteenth century (10 of which are for Üsküdar), 34 volumes belong to the seventeenth-century courts of various districts of Istanbul. In these volumes, there are only three *zina* cases from the seventeenth-century records (2 Istanbul, 1 Bâb) of the total of 18 *zina* cases. The remaining 15 *zina* cases belong to the sixteenth-century records of the Üsküdar court. At the same time, the same Üsküdar court records from the sixteenth century contain 5 *fi'l-i şeni'* cases. There seems to be a preference for the use of *zina* over *fi'l-i şeni'* in the sixteenth-century Üsküdar records, though the latter term was not totally alien to the court. This finding also conforms to the terminology preferred by the Aintab court in the sixteenth century. Unfortunately we do not know if the Üsküdar court continued to use the term *zina* in the seventeenth century, since ten volumes of Üsküdar records available in the ISAM collection all belong to the sixteenth century. Yet, the remaining 11 of the total 16 *fi'l-i şeni'* cases belong to various other courts of seventeenth-century Istanbul, whereas we find only 3 cases in which *zina* was used by these courts during the seventeenth century (as mentioned above). Here, we also observe a clear preference for the use of *fi'l-i şeni'* over *zina* in Istanbul, Eyüp, Bâb, and Rumeli courts in the seventeenth century. Yet, the number of cases in which the term *fi'l-i şeni'* is used are not many in numbers compared to my data from Bursa and Ankara court records from the eighteenth century.

Finally, *fetva* collections of the eighteenth century did not entirely stop using the term *zina* to refer to fornication and adultery. In fact, in these collections, the first offense under the heading of *hudud* (violations against God) was still *zina*; this accords with the classical categorization of crimes in Islamic jurisprudence. Nevertheless, the offenses discussed in this section were either very brief or supported by *fetva*s explaining exceptional situations (*ta'zir*), such that the crimes would not be categorized or punished by the regular "penalty for *zina*" prescribed by the *shari'a* (*hadd-ı zina*).[98] In fact, Yenişehirli Abdullah never used the term *zina* for such situations in *Behcetü'l-Fetava*, the collection of his *fetva*s from the first half of the eighteenth century.[99] In his *fetva*s the term *fi'l-i şeni'* was also used according to its literal meaning—though very rarely—as a euphemistic term to refer to "indecent acts." In the first example, the offense of sodomy, which was mentioned in the same *fetva* was described as *fi'l-i şeni'*, and in the second, the selling of alcohol to Muslims by Christians' and Jews was defined as "indecent act."[100] In this context, it appears that the term was not necessarily used for sexual offenses. There is also one incidence in which he used *fi'l-i fahiş* (extreme act) to refer to sexual intercourse/copulation that took place after the abduction of a woman.[101]

Thus, in the mid-eighteenth century there seems to have been a tendency to use the term *zina* less, or to drop it entirely, in the Bursa and Ankara courts, as well as in the Imperial Council. This may reflect a tendency that had already begun in the seventeenth century, if not before. The utilization of the term *zina* in the court language diminished to a very few cases in which the requirements of the *hadd* crime were established so that the *hadd* punishment for *zina* could be applied. Otherwise, in the court practices of mid-eighteenth-century Anatolia that we have observed in the current chapter, a variety of sexual offenses, including the slander of fornication, were defined through the euphemistic term of *fi'l-i şeni'*, while *hetk-i ırz* was used in the petitionary practices.

Even though the observations of the current study are geographically limited, especially for the legal terminology used by the local courts, the diminution of

98 I explore this point in more detail in the following pages.

99 Yenişehirli Ebü'l-Fazl, *Behcetü'l-Fetava ma'an-Nukul*.

100 Ibid., 152. Please note that both of these *fetva*s are under the *Nevi' fi'l-ta'zir bi'l-katl* section while the *fetva*s concerning "regular" fornication (*zina*) cases are in the *Kitabu'l-hudud*.

101 "…birkaç gün Hindi menzilinde alıkoyub beynlerinde fi'l-i fahiş vaki olmaksızın…," ibid., 151.

the term *zina*[102] from the vocabulary of legal practice in the eighteenth century, which we also observe in the language of the Imperial Council and Ottoman subjects' petitions, may relate to an increasing awareness of the need to create a flexible basis on which to punish sexual crimes through the principle of *ta'zir*. The appearance of both terms in the nineteenth-century criminal codes once more points to the fact that eighteenth-century legal practice was finally codified in legal reforms of the following century. One should also note that *zina* remained the legal term of Islamic jurisprudence, as reflected in eighteenth-century *fetva*s, and this does not contradict the fact that legal practice developed its own terminology to refer to the vast majority of sexual offenses that remained a residual category (*ta'zir*) under Islamic jurisprudence. Yenişehirli Abdullah's more extensive explorations of *ta'zir* crimes under the title of *zina*, as I explain in the next chapter, also indicates that the political authority likely faced the same necessity of regulating sexual order more effectively through discretionary punishment.

Other Expressions Used in the Registers to Describe Sexual Assaults

Apart from the most commonly used euphemistic terms *fi'l-i şeni'* (indecent act) and *hetk-i ırz* (violation of honor), other expressions were used to refer to sexual assaults in the legal language. Except for the term *kazf* (قذف) used for false accusation of unlawful sexual intercourse which is a *hadd* crime in the *shari'a*, the other expressions share the same characteristics with the former two: They seem to have been used specifically to differentiate the deeds from the *hadd* crimes (of *zina* and *kazf*), in order to impose other types of punishments and at the same time define the offense in a more specific way—albeit in a legalistic logic.

For example, when legal authorities preferred to mention specifically the offense of defloration, generally in cases related to virgin girls, a special term was used: *bikrini izale et*[*mek*] (to violate [her] virginity). For the most part this

102 Interestingly enough Dror Ze'evi attributes the "abandonment of *zina* as a legal concept" to the western inspired Criminal Code of 1858, which I discuss in the context of *hetk-i ırz* (violation of honor). The absence of any studies on sexual discourse in the eighteenth-century Ottoman legal practice makes him think that this phenomenon is a "modern" invention that appeared in the nineteenth century. Ze'evi, *Producing Desire*, 72–74.

term is found in the *kadı* court records,[103] though it is also encountered, though rarely, in the registers of the Imperial Council.[104] As we discussed, the *kanun* paid attention to the consensual or non-consensual character of the act by reserving separate clauses for abduction and sexual molestation. However, it does not seem to have paid too much attention to the issue of a girl's virginity. Yet, eighteenth-century *fetva* collections used the term just as the court records used it: "If Zeyd seizes Amr's virgin slave (girl) by force and commits fornication and deflowers her, what must be done to him? Answer: One hundred strokes are needed and he should compensate her for the loss of her virginity."[105] Thus, in *fetva* literature and the court language the concept coexisted, whereas it was rarely used in the Imperial Council registers and the sixteenth-century *kanun-name*s; this reflects a social consciousness about virginity which found its way into court practices. So, we can conclude that the court borrowed this attention to "deflowering" from Islamic jurisprudence—at least in its practical side as we see through the *fetva*.

The most commonly used term for insulting behavior was *şetm* (pl. *şütûm*; شتم), meaning "revile, curse."[106] Its use was not limited to sexual offenses; it was frequently used in quarrels and physical attacks involving wounds. At the same time it was utilized to refer to verbal abuse and assaults on someone's honor in a manner similar to the usage of "violation of honor" (*hetk-i ırz*). Yet, in many court cases, verbal abuse itself was associated with sexually and morally dissolute behavior. For example, Salih Beşe brought a case to the Ankara court on 24 November 1743 against Mehmed Ağa and his wife Saliha who joined some "brigands," pounded on his door with an axe, and reviled him with "dreadful insults" (*şütûm-ı galîza*).[107] However, when asked for their testimony by the court, the neighbors gave evidence not about the event itself, but about other improper dealings of the couple. They complained that their house was a "house of mischief" and that neither of them refrained from close association

103 BCR, B121, 33; ACR, 121, 125. An incident of rape and its trial in the *kadı* court was reported by the *kadı* of Bursa to the Imperial Council by using this term in BOA, Anadolu Ahkam Defteri 1, case 399. This final case is analyzed in detail in Chapter 3.

104 BOA, Anadolu Ahkam Defteri 3, case 501; BOA, Kal'abend Defteri 8, page 14, case 1.

105 "Zeyd Amr'ın bikr olan cariyesi Hindi gasben ahz ve Hinde zina edüb bekaretini izale eylese Zeyde ne lazım olur? Elcevab: Yüz değnek urulur ve cariyenin noksan bekaretini zamin olur." Yenişehirli Ebü'l-Fazl, *Behcetü'l-Fetava ma'an-Nukul*, 145.

106 Sir James W. Redhouse, *A Turkish and English Lexicon* (Constantinople and Beirut: Librairie du Liban, 1890/1987), 1116.

107 ACR, 122, 102 (7 Şevval 1156/24 November 1743).

with the other sex. The neighbors finally mentioned that "they have suffered from their [abusive] language."[108] Insulting someone's "family and wife by using salacious remarks" was considered an "attack on honor" and therefore recorded in the court as a legitimate accusation.[109]

In most litigation a similar logic to that of using the term *fi'l-i şeni'* instead of *zina* in court practices must have been employed here in using *şetm* instead of *kazf* (false accusation of unlawful sexual intercourse). Since *kazf* was a *shari'a* based *hadd* offense with stringent conditions and rules of evidence such as the necessity of explicitly mentioning unlawful sexual intercourse in the wording of slander and proving the accusation, categorizing many of the insults under the looser concept of cursing and reviling (*şetm*) must have released the court from strict *shari'a* procedures. The court, in fact, followed the strict rules of the *shari'a* when it identified a case as *kazf.* For example, it was used as such in Zeynep's accusation of Mahmud, which follows: "he slandered me with *kazf* by talking [to people] in my absence [and saying] that he fornicated with me and deflowered me," and the *hadd* punishment of *kazf* was inflicted on the culprit after the investigation of the case.[110]

Thus, labeling insult cases as *şetm* enabled the court to apply a more diverse and flexible *ta'zir* punishment to such offenses.[111] The rudiments of this mentality were in fact observed in "the old criminal code" that reserved specific clauses for sexual molestation other than fornication and *kazf.* Among the offenses considered sexual molestation, for example, some were explicitly mentioned: "addressing [indecent words]" to a man's wife, daughter, or son and "offering [her] a gross indignity," and in the *kanunname* of Süleyman I, along with kissing and touching [her], cutting [her] hair and taking away [her] garments.[112] For such molestations, the *kanunname* prescribed *ta'zir*

108 "… daiman kendu hallerinde olmayub her biri na-mahremden ictinab itmeyüb menzilleri me'vaü'l-fesad olmağla mezburların yeddinden ve lisanından dahi emin ve salim olmamağla…," ACR, 122, 102 (7 Şevval 1156/24 November 1743).

109 "…cemma' lafzıyla ehl ü iyalime şetm…," ACR, 121, 240. For a case in which habitual criminality and so-called "banditry" were described through the offenses of reviling, sexual/moral harassments, and the use of weapons, see BCR, B166, 35A/2.

110 "… gıyabımda benim içün fi'l-i şeni' edüb bikrini izale eyledüm deyü kazf itmişdir…," ACR, 122, 94.

111 Peters counts "defamation on other grounds than unlawful sexual intercourse" under the category of *ta'zir.* Peters, *Crime and Punishment in Islamic Law*, 66. See also the explanation for slander under the title "Tazeer" in al-Marghinani, *The Hedaya*, 203–204.

112 See Articles 18, 19, 20, and 21 in Heyd, *Studies in Old Ottoman Criminal Law*, 61, 100.

punishment, i.e., chastisement defined in terms of the number of lashes in the specific clause on molestation.[113] Another clause under the heading of "Mutual beating and abuse, killing and the fines" also applied *ta'zir* for "unlawful language" as follows: "Article 56: If a person addresses unlawful language to another [person], the cadi shall chastise [him] and a fine of one *akçe* shall be collected for [every] two strokes."[114] The transformation of the strict *shari'a* terminology into more diversified definitions in the old criminal codes suggests the logic that different terms (other than the mainstream *shari'a* terminology) were used in eighteenth-century court practice.

Last but not least, in the court records "enticing boys" for sexual purposes was defined by the term *ızlâl/ıdlâl*. *Izlâl* (اضلال) means "misleading or misdirecting, leading astray; perverting."[115] The documents do not explicitly define what they mean by "misleading," but the term was only used in relation to boys.[116] A mother from Istanbul, for instance, petitioned the Imperial Council in August 1742 complaining about a man who had enticed her ten-year-old son, abducted him, and taken him to Aydın the previous year.[117] Another petition in October 1743 came from a Muslim father who claimed that a Christian man had abducted, assaulted, and raped his son in Antalya.[118] The *fetva* collections at the time used a term for "enticing" for both women and men. In a *fetva* of Yenişehirli Abdullah, the term is used in a legal question asking for the penalty for "those who 'lured' Hind, Zeyd's wife, and remarried her to Amr."[119] In another case, Yenişehirli Abdullah uses the same term in relation to enticing virtuous free men and selling them.[120] Like sexual molestation, the *kanunname* of Süleyman I interestingly counted "luring away a boy" among theft offenses

113 Article 18 says: "If a person kisses or licks another [man]'s wife or daughter or approaches her on her way and addresses [indecent words to her] or molests [her], the cadi shall chastise [him] severely and a fine of one *akçe* shall be collected for each stroke." Ibid., 100.

114 Ibid., 110. "Bir kimse ahire na-meşru' kelime söylese kadı ta'zir idüb iki ağaca bir akçe alına," in ibid., 71.

115 Redhouse, *A Turkish and English Lexicon*, 134.

116 See BOA, Anadolu Ahkam Defteri 1, case 77. In a case in the Ankara court records, a non-Muslim father was accused by neighbors of attacking and assaulting them, and was then also accused of enticing and seducing his own son. See, ACR, 121, 214.

117 BOA, Anadolu Ahkam Defteri 1, case 77 (Cemaziye'l-ahir 1155/August 1742).

118 BOA, Anadolu Ahkam Defteri 3, case 648 (Şaban 1156/October 1743).

119 The penalty was severe chastisement. "Birkaç kimesne Zeydin zevcesi Hindi ızlâl idüb Amre tezvic eyleseler mezburlara ne lazım olur? Elcevab: Ta'zir-i şedid." Yenişehirli Ebü'l-Fazl, *Behcetü'l-Fetava ma'an-Nukul*, 150.

120 "Zeyd ahrarı ızlâl ve bey ider olduğun şer'an sabit olsa Zeyde ne lazım olur? Elcevab: Ta'zir-i şedid ve habs-ı medid." Ibid., 153.

under the heading of *siyaset*, that is, offenses which would receive *ta'zir* punishment under the discretion of the political power.

> Article 74: Furthermore, [a person] who steals a prisoner of war, lures away a male or female slave [from his or her master], lures away a boy and goes away [with him], breaks into a shop, enters a house [with intent to steal?], or patently commits theft several times shall be hanged.[121]

As we observe, both the *kanunname* and the *fetva*s of Yenişehirli Abdullah defined luring away not by the *shari'a* based term *livata* (sodomy) but again as a *ta'zir* crime.

* * *

The translation of people's experiences into Ottoman legal language ironed out and homogenized the multiplicity of violence, crime or ordinary quarrels in the everyday lives of Ottoman subjects. It is difficult for the researcher to find individual nuances in cases narrated in eighteenth-century courts. Yet, while categorizing the complexities of everyday life in the existing legal milieu, the language of the courts also modified and diversified this legal language. Court practices in eighteenth-century Anatolia utilized certain new categorizations and terminology that did not originate from either the *shari'a* or the *kanun*. These different categorizations were created, for the most part, in early-modern Ottoman legal practices, and in fact, its practical outlook contributed to the gradual construction of a new legal discourse over the long term.

Although court language remained bland, with euphemisms and synecdochical expressions to voice everyday experiences, in its selection of terminology and emphasis it still reflected socially important values. The courts and the legal authorities of the eighteenth century seem to have utilized normative law selectively to fulfill socio-moral needs as well as to proliferate the possibilities of categorizing offenses and carrying out penalties more effectively. For instance, in theory, virginity was not an issue for the *kanun*—at least in sixteenth-century *kanunname*s—because, with regard to punishment at least, the laws did not differentiate between a maiden and a woman subjected to sexual assault and rape. However, in action courts seem to have made an effort

121 Heyd, *Studies in Old Ottoman Criminal Law*, 114. "Ve dahi esir uğrulayanı ve kul ve cariye ayardanı ve oğlan ayardub gidani ve dükkan açanı ve eve gireni ve birkaç def'a hırsızlığı zahir olanı salb ideler." Ibid., 75.

to differentiate between whether the alleged victim was a woman or a maiden by explicitly mentioning deflowering (*bikrini izale etmek*), which was also an important matter in *fetva* literature. As for sexual assaults and molestations other than fornication, Islamic jurisprudence was not detailed and explicit about punishment. Thus, in cases such as "abduction and marriage," "breaking into a house" or "enticing a boy," in principle legal practice in the eighteenth century borrowed the vocabulary of the *kanun*.

At the same time, legal practice in Anatolia apparently created its own terminology, such as "indecent act" (*fi'l-i şeni'*) or "violation of honor" (*hetk-i ırz*), and these were not directly inspired by either the *shari'a* or the *kanun* in normative law. These terms seem rather to be reflections of the politico-legal praxis of finding a way to avoid the stringent *shari'a* rules on fornication and adultery. While "indecent act" was mostly used in local court language, which seems to have earlier roots in Ottoman court practice, "violation of honor" was predominantly utilized in legal communications between the Ottoman central state and its subjects, as we have observed in the petitioning processes of the eighteenth century. The legal repertoire in action seems to have enabled Ottoman powers to categorize and punish sexual offenses more effectively on the principle of *ta'zir*, as I explain in the last chapter.

CHAPTER 5

The Penal Order of Eighteenth-century Anatolia

One of the most commonly accepted yet puzzling facts for those who study Ottoman *kadı* court records is the fact that the verdict of the *kadı* and the punishments imposed were rarely recorded. Though we know what the *shari'a* and *kanun* prescribed for crimes such as fornication or theft—albeit these were still based on rather ambiguous definitions—court records seldom explicitly mention the sentences that were passed or the punishments that were meted out. This aspect of Ottoman court records makes analyzing the penalties in "law in practice" much more difficult than analyzing the offenses, as in the previous chapter.

In this chapter I discuss this enigma of punishment with a focus on sexual offenses in the eighteenth-century Ottoman legal system. Despite the obstacles arising from the silence of the court records on punishments, I argue that looking only at the larger picture of penal regulations through the interplay of different legal sources, such as court verdicts, imperial decrees, petitions, and various kinds of correspondence between legal authorities can give us an idea about the punishments and penal administration of the sexual sphere in the eighteenth century. It is critical to explore the punishments incurred under a legal system in order to understand how power operated in that society and how subjects were disciplined through sanctions. As the rest of this study demonstrates, such an exploration is particularly important for the eighteenth-century Ottoman Empire, given that the central government's anxiety to maintain public order grew out of an overtly fragmented provincial power structure that instigated a transformation in the penal system toward a more closely scrutinized administration of crime.

The Enigma of Crimes and Punishment in the Court Records

An analysis of the court records of Bursa and Ankara for the years from 1742 to 1745 reveals a problem: In both Ankara and Bursa, while the judges handled a variety of criminal disputes in general, and sexual offenses in particular, it was very difficult to find a court verdict that clearly indicates the punishment meted out to the guilty party. Even though in certain cases the records indicate that the *kadı* delivered a judgment when court investigations established the guilt of the party, we rarely see what the judgment was, whether a punishment

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was imposed, and if so, how and by whom the punishment was carried out. In fact, this phenomenon is not unique to Ankara and Bursa court records, but is common for Ottoman *kadı* court registers.

But before discussing the absence of stated punishments in the court records, we should note that the number of recorded criminal cases was also low. Criminal disputes generally constituted a small number compared to other disputes and legal transactions recorded in the local *kadı* courts.[1] Faroqhi and Jennings call our attention to the low number of recorded crimes in the court records for Çorum and Trabzon respectively in the late sixteenth and early seventeenth centuries.[2] Ginio, who worked on the Salonica court records of the eighteenth century, reports a low number of criminal cases (13 out of 184) recorded in a period of fourteen months between 1740 and 1741. Similarly, Zarinebaf gives the figure of three criminal cases out of twenty-seven lawsuits in the records of the district court of Istanbul in November 1767.[3] Finally, Ergene shows that only 27 of the 450 disputes recorded in the court of Kastamonu between 1781 and 1791 were related to crime.[4] However, it is difficult to make a generalization about the rarity of crime recorded in the courts since there are also significant regional and temporal differences between the courts on this issue of recording crime. For example, Abdul Karim Rafeq's study of the eighteenth-century Damascus court records documents a relatively high rate of crime—especially crimes against public morality—from "rural" (suburban) areas of the city outside the citadel.[5]

Yet, similar to the findings of the majority of research on the Ottoman court records of the seventeenth and eighteenth centuries, criminal trial documentation is rare compared to other documentation in the court records of Ankara and Bursa between 1742 and 1745.[6] Nevertheless, neither the court of Bursa nor

1 Eyal Ginio, "The Administration of Criminal Justice in Ottoman Selanik (Salonica) during the Eighteenth Century," *Turcica* 31 (1999), 187–188.

2 Faroqhi, "The Life and Death of Outlaws in Çorum," in *Coping with the State: Political Conflict and Crime in the Ottoman Empire, 1550–1720* (Istanbul: Isis Press, 1995), 145. Ronald C. Jennings, "The Society and Economy of Maquka in the Ottoman Judicial Registers of Trabzon, 1560–1640," in *Studies on Ottoman Social History in the Sixteenth and Seventeenth Centuries: Women, Zimmis and Sharia Courts in Kayseri, Cyprus and Trabzon* (Istanbul: Isis Press, 1999), 607.

3 Zarinebaf, *Crime and Punishment in Istanbul*, 145.

4 Ergene, *Local Court, Provincial Society, and Justice*; Coşgel et al., "Crime and Punishment," 372.

5 Rafeq, "Public Morality in 18th Century Ottoman Damascus."

6 Although this study is not based on a quantitative analysis, we might still say, cautiously that disputes of a criminal nature constituted approximately ten to fifteen percent of the entire documentation in the court records analyzed for this study. Furthermore, it is not possible

that of Ankara worked only as a notarial or administrative center with minimal judicial function. Rather, both courts were centers in which active negotiation and dispute resolution took place; the people deployed the *kadı* together with alternative communal (*sulh*; amicable settlement)[7] and legal (orders coming from the imperial and governor's councils) means.[8]

This relatively small number was a result of the fact that the Ottoman courts were not merely judicial centers. In addition to their judicial role, they also had administrative and notarial functions.[9] The balance between these functions of the courts differed from one court to another according to region and period.[10] Therefore, taking into account these factors, the low frequency of criminal cases recorded in the court register may not necessarily indicate a low number of crimes in total. We must consider the possibility that people may not have used the courts as the primary venue for dispute resolution. As earlier chapters demonstrated, legal pluralism allowed people to use alternate venues, such as the Imperial Council and governors' provincial councils. More often

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to give exact numbers because, first, there is a significant overlap between civil disputes (inheritance, property, marital disputes, etc.) and criminal cases (breaking into houses, sexual offenses, wounding, murder, and others), and second, there is some difficulty in distinguishing between orders coming from the authorities (from the Imperial Council and governors in general) concerning criminal cases and those related to the criminal accusation heard by the *kadı*.

7 It was also possible for amicable settlements (*sulh*) to take place in the court. See, Ergene, "Why Did Ummu Gulsum Go to Court."

8 In the court records analyzed here, the percentage of the registry of the documents sent by higher authorities are almost equal to the transactions handled by the court itself in four volumes (ACR 121, 122 and BCR B166, B121) whereas one volume consists of more orders from higher authorities (approximately one-third of the volume) than its own transactions (ACR 124). Although such a small number of volumes are not truly representative (for example, one volume of the Bursa court records for the time period of 1742–1745 [BCR B167] consists of probate inventories only), such a composition can be read as a sign of interplay and interdependence between different legal institutions.

9 In addition to judicial disputes, local courts recorded various kinds of contracts, commercial transactions, marriage, alimony and divorce contracts, and probate inventories, etc. They also recorded the administrative documents and judicial orders from the imperial center and the provincial governors.

10 For example, Ergene claims, by looking at the statistical portions of various kinds of documents over a ninety-year period, that the administrative and notarial functions of the Çankırı court overshadowed its judicial functions; he based this on the high percentage of documentation sent from the imperial and provincial centers, whereas in the Kastamonu courts in eighteenth-century Anatolia the judicial functions stood out. Ergene, *Local Court, Provincial Society, and Justice*, 33–44.

than the other courts, people used semi and/or unofficial means, such as amicable settlement (*sulh*) or personal/communal dispute resolution outside the court.[11] People thought that applying to other venues of dispute resolution was more advantageous in certain cases, especially when it concerned criminal offenses.[12] Hence, the *kadı* court was "only one of the institutions that handled crime."[13] In other words, not all criminal incidents that occurred in a particular locale were recorded in the court records.

The rarity—almost absence—of documented punishment in Ottoman court records in general, and in the Ankara and Bursa records in particular is, however, not proportionate to the low number of criminal cases. Various scholars who have worked on Ottoman court records remark repeatedly on the enigmatic absence of punishment in these records for different periods and regions of Ottoman rule. Scholars of local court records of earlier centuries—namely the fifteenth and sixteenth centuries—simply state that no penalties were recorded in most criminal cases.[14] The situation was not radically different for later periods. In his study on dispute resolution in Çankırı and Kastamonu from 1652 to 1744, Boğaç Ergene mentions that "the court records do not generally disclose the kinds of punishment inflicted on guilty parties."[15] Furthermore, Zouhair Ghazzal argues that the number of homicide-related

11 Peirce shows how these other legal venues, such as applying to village or neighborhood imams, the elders of tribal leaders, or going to the governor general with a *fetva* obtained from the local mufti, worked in parallel or in an overlapping manner in sixteenth-century Aintab. Peirce, *Morality Tales*, 123–125. For eighteenth century examples, see Ergene's work on Kastamonu and Çankırı (Ergene, *Local Court, Provincial Society, and Justice*, 170–188.); Ginio's work on Selanik (Ginio, "The Administration of Criminal Justice," 200–208); and Tamdoğan's article on *sulh* cases in Üsküdar and Adana court records (Tamdoğan, "Sulh and the 18th Century Ottoman Courts of Üsküdar and Adana").

12 See Chapters 2 and 3 for people's strategies in applying to the Imperial Council for certain criminal cases, such as homicide, serious wounding, and banditry offenses.

13 Ginio, "The Administration of Criminal Justice," 38.

14 Halil İnalcık found no penal cases at all in a volume of Bursa court records in the fifteenth century. Halil İnalcık, "Osmanlı İdari, Sosyal ve Ekonomik Tarihiyle İlgili Belgeler: Bursa Kadı Sicillerinden Seçmeler," *Belgeler* 10, no. 14 (1980–81). Similarly, Halit Ongan could not find penalties listed in the records of criminal cases in sixteenth-century Ankara court records. Ongan, *Ankara'nın İki Numaralı Şer'iye Sicili*. Leslie Peirce's study also confirms this observation in principle for the Aintab court records of 1540–41 although punishments were not totally absent in these records. Peirce mentions that criminal fines were directly or indirectly indicated while other punishments such as imprisonment, banishment, flogging, and compensation (*diyet*) were occasionally applied. Peirce, *Morality Tales*, 331–340.

15 Ergene, *Local Court, Provincial Society, and Justice*, 161.

cases typically varied from none to two at most per *sijill* (court record) in the courts of Beirut and Damascus in the mid-nineteenth century and thus he concludes that judges were not concerned with punishment.[16] The only exception to the above-mentioned consensus on the low number of registered penalties is Haim Gerber's studies on seventeenth-century Bursa.[17] He claims that with the exception of twenty percent of the criminal cases in which there was no verdict and no punishment meted out, the *kadı* of Bursa delivered the verdict and the penalty in the overwhelming number of criminal cases.[18] As indicated, in many criminal cases registered in both the Ankara and Bursa court records analyzed for this study, it is difficult to find a *kadı* verdict that clearly indicates the punishment meted out to the culprit. Thus, the rarity of punishment was almost epidemic in the Ottoman court records throughout the centuries.

In this study I contend that this rarity has certain systemic causes that can therefore only be understood by an analysis of the larger structural framework of the Ottoman legal system. Looking at the larger legal framework means challenging a *kadı*-centric approach, which has the risk of separating local judges from a more complex net of legal institutions and law enforcement agents in the empire. Analyzing the relationship of adjudication to enforcement, in other words, the relationship between the *kadı* and the military administrative officials in a particular period of time and place is indispensable to such an approach.[19] Such an investigation also leads us to conclude that imperial orders registered in the court records, the trials heard by the *kadı*, and those of the imperial registers should be analyzed together if we want a comprehensive analysis of crime and punishment in the Ottoman courts.[20] This

16 Zouhair Ghazzal, "The Rarity of Crime, the Phantom of the Victim, and the Triangle of Debt," in *Workshop for the Study of Strategies for Reading Ottoman Qadi Court Documents* (Harvard University, 2008), 4–6. Also see Ghazzal, *The Grammars of Adjudication*, 618.

17 Gerber, *Economy and Society in an Ottoman City*, 68.

18 He further claims that "the same seems true of other *kadı*s in the core region of the empire." He also argues, by comparing his data with others' claims on the absence of punishment, especially on the sixteenth-century courts, that "seventeenth-century Bursa evinces a substantially different situation, indicating that a major change took place in the interim." Ibid.

19 The study of Ergene (et al.) on crimes and punishments in Ottoman times and the eventual abandonment of fines after the seventeenth century is a recent and exceptional example of such a comprehensive analysis that incorporates law enforcement into the analysis of adjudication and the Ottoman legal system at large. Coşgel et al., "Crime and Punishment."

20 Zarinebaf pioneered an analysis of *kadı* court records in tandem with central government's registers in order to write about the social history of crime and punishment in

endeavor is particularly valuable to understand the administration of sexual and moral order in a larger framework. This study already documents the fact that many complaints found their ways into petitions and the Imperial Council registers in the eighteenth century. Thus, understanding the penalties inflicted would help us better comprehend the state's involvement in moral order in eighteenth-century Anatolia.

Social and Institutional Limits to the Authority of Local Judges

A close examination of the Ankara and Bursa court records and the petitionary documents (petitions and Imperial Council registers) in the mid-eighteenth century reveal frequent interaction and movement of documents between the local *kadı*s and higher authorities, especially the Imperial Council. In addition to correspondence on administrative matters that concerned the *kadı* and the other local officers, there were an important number of criminal matters on which the Imperial Council, provincial judges, judges or deputy judges of the sub-divisions (*kaza*) and various provincial administrative officials interacted. The documents on this correspondence on criminal matters demonstrate that the *kadı*'s decisions were not independent of local and imperial authorities nor were they final in his jurisdiction, contrary to the argument presented in conventional historiography on judges under Ottoman rule.

The delegation of judicial authority to the local *kadı*s in the eighteenth century looks substantially different from that of the sixteenth century. During a period of imperial consolidation in the sixteenth century, the central government tried to establish a judicial system by promoting the local courts and *kadı*s as the main venues for justice in an effort to regulate the monopoly of local elites over arms and the means by which to inflict punishments. Despite the fact that the political authority never fully delegated judicial power to the *kadı*s (it continued to use its *siyasa* authority extensively through the imperial law books), *kadı*s were still the favorite legitimizing apparatus of the central government in this period. In the eighteenth century, however, with an increase in the autonomy of the local powers in provincial administration

eighteenth-century Istanbul. The special and close relationship between the judges and courts of Istanbul and the Imperial Council makes the task of connecting various legal venues feasible. Zarinebaf, *Crime and Punishment in Istanbul*. For a comprehensive analysis of public order in late eighteenth-century Istanbul with an inquiry into the interplay of various legal institutions and actors, see Başaran, *Selim III, Social Control and Policing in Istanbul*.

parallel to the bureaucratization of the state apparatus, the central government established a more centripetal control over the penal system through petitions and the judicial hierarchy, both of which were crystallized and became more professional by the eighteenth century. The *kadı*'s legitimizing role and the judicial functions delegated to him by the political power diminished under such a politically controlled penal system. In this sense, local courts, at least in Anatolia, the core region of the empire, appeared to function as the venue in which the *kadı* and the community came together to establish the "crime" with, however, little say on the punishment of the criminal.

Judicial Review and the Hierarchy in Judicial Administration: The Governor, the Provincial Kadi and the Lower Kadi(s)

The conventional view that the *kadı*'s decision was final according to Islamic law[21] and in the Ottoman legal system[22] has been discussed and challenged by many scholars. Scholars of Islamic law (*fiqh*) have challenged the idea that there is no judicial review in Islamic law. Baber Johansen shows that procedures for revising the judgment of a *kadı* were established during the classical period of Hanafi law and Ottoman muftis developed new arguments in order to dispute a *kadı*'s judgment after a verdict.[23] Furthermore, while Martin Shapiro sought to prove that there is generally no appeal in Islamic law, in fact he gave two exceptional historical examples of appellate institutions. According to him, the *mazalim* courts established by the Abbasids, and the Imperial Council of the Ottoman sultans were the appellate institutions whereby Islamic law and a hierarchical government intersected in relatively stable and long-term establishments.[24] Yet, David Powers, in his study of fourteenth-century Morocco, claims that "hierarchical organization was a regular feature

21 Schacht, *An Introduction to Islamic Law*, 188–189; "Mahkama," in *Encyclopaedia of Islam, Second Edition*, ed. P. Bearman, et al. (Brill Online, 2008).

22 The most prominent of the pioneering works that discuss the office and institution of the *kadı* are Gerber, *State, Society and Law in Islam*; Ronald C. Jennings, "Kadi, Court and Legal Procedure in Seventeenth Century Ottoman Kayseri," *Studia Islamica* 48 (1978); Jennings, "Limitations of the Judicial Powers"; İlber Ortaylı, "Some Observations on the Institution of Qadi in the Ottoman Empire," *Bulgarian Historical Review* 1, no. 10 (1982): 57–68; Ortaylı, *Hukuk ve İdare Adamı Olarak Osmanlı Devleti'nde Kadı* (Ankara: Turhan Kitabevi, 1994).

23 Baber Johansen, "Le jugement comme preuve. Preuve juridique et vérité religieuse dans le Droit Islamique hanéfite," *Studia Islamica* 72 (1990): 15–17, as quoted in Gradeva, "On Judicial Hierarchy in the Ottoman Empire," 271–272.

24 Martin Shapiro, *Courts: A Comparative and Political Analysis* (Chicago and London: University of Chicago Press, 1981), 211, 220, as quoted in Gradeva, "On Judicial Hierarchy in the Ottoman Empire," 272–273.

of Muslim polities and that these polities appear to have developed a rudimentary, *informal* appellate structure in which the court of the chief qadi of the capital city served as a court of review for the decisions of local and provincial judges."[25] He also points to the fact that Islamic legal doctrine in fact allowed a system of successor reviews that were operated according to specific principles.[26] The classical doctrine maintains, "if a judge is not legally competent or if a legally competent judge engages in the improper use of independent reasoning, his judgement may be nullified by another judge."[27] In this sense, he claims that Islamic law provides for the reconsideration of a dispute before a second judge and the sultan's delegation of his judicial authority to the chief judge of the capital and the provincial judges in fact do not contradict the Islamic theory of judicial unity; this opens up the possibility for a practical informal appellate structure.[28] He gives examples from the fourteenth-century Marinid dynasty in which the chief judge of the capital (Fez) supervised a ruling of the local judge in one case and reversed a ruling of a predecessor judge in another.[29]

In Ottoman studies, research on *kadı* court records and the functions of the judge in the judicial administration has long established the limits of the *kadı*'s judicial authority in action. First, research on the early-modern period shows that the Ottoman political power never acknowledged the full competence of the *kadı* in judicial administration. The *kadı*'s jurisdiction was limited to taxpaying Ottoman subjects. Even though Ottoman imperial power in the sixteenth century promoted an "expanding system of local courts as the principal venue for legal administration," in which the *kadı* was endowed with the authority to administer justice and supervise law enforcement processes,[30] the purpose of this was not to invest the *kadı* with full authority in jurisdiction but rather to make him a manageable judicial arm of the central government in the province. In fact, political authority reserved for itself the jurisdiction and punishment of the military-administrative class. The sixteenth-century law book of Süleyman I states that criminal offenses committed by the sultan's officials (*kul*s) (i.e., fief-holders, religious officials [*'alim*], military and administrative officials) must be submitted to the Imperial Council and no punishment

25 David S. Powers, "On Judicial Review in Islamic Law," *Law & Society Review* 26, no. 2 (1992), 317.

26 Ibid., 320–324.

27 "Appeal," in *Encyclopaedia of Islam, Three*, ed. Kate Fleet, et al. (Brill Online, 2016).

28 Powers, "On Judicial Review in Islamic Law," 328–329.

29 Ibid., 331–336.

30 Peirce, *Morality Tales*, 311–312.

might be inflicted on them without an imperial order.[31] This in effect created a two-tier judicial system, as Peirce demonstrates, one for members of the ruling class and one for taxpaying Ottoman subjects.[32]

Furthermore, the administration of criminal justice was far from being under the absolute autonomy of the *kadı*. Although there was no clear-cut separation of powers between the executive, the judiciary, and the legislative authorities in the early-modern Ottoman legal structure, the Ottomans created a division of labor between the legal religious authorities (*ehl-i şer*) in charge of adjudication and the administrative authorities (*ehl-i örf*) in charge of execution or law enforcement; nonetheless these divisions often overlapped.[33] Since military-administrative officials (i.e., fief holders) under the command of the district governor (*sancakbeyi*) were responsible for bringing suspects to the court and executing punishments, and were also authorized to collect fines on crimes and transgressions (*cürm ü cinayet*),[34] they had a direct interest in the administration of public order and in the revenues that issued from this. Ergene and his colleagues point to the fact that the roles of the military-administrative officials, that is, the prevention of crime and the collection of fines from the criminals, created a conflict between the social benefit (preventing crime) and self-interest (maximizing fine revenues) that the administrators might pursue.[35] Even though this dilemma was supposed to have been solved in earlier periods by assigning taxes and fines to the same recipient, by the late seventeenth century, the *sipahi*s were replaced by tax farmers as local governors of provincial centers, or rivalries appeared between the military administrative officials and the tax farmers about law enforcement and the collection of taxes and fines and this challenged the balance between the various powers.[36] While the local elite reinforced their power through lifelong tax-farming, in addition to legal and illegal means of enforcement, "judges (*kadı*s), who occupied their positions for only a year or so, gradually lost their ability to limit predatory activities within these strongholds or to rectify the crimes of provincial authorities."[37] Thus, many *kadı*s either overlooked criminal activities or illegal extortion and punishments by administrative authorities or became actively involved and cooperated with them. Chapters 2 and 3 demonstrate

31 Articles 87 and 123 in Heyd, *Studies in Old Ottoman Criminal Law*, 118, 129, 269.

32 Peirce, *Morality Tales*, 314.

33 Jennings, "Kadi, Court and Legal Procedure."

34 Kunt, *The Sultan's Servants*, 21–23.

35 Coşgel et al., "Crime and Punishment," 364–368.

36 Ibid., 370–375.

37 Ibid., 370–371.

particular petitions and reports of such instances that found their way to the Imperial Council.

Finally, law enforcement officials and other *ehl-i örf* were often witnesses in cases involving major crimes, as Jennings calls to our attention.[38] Witnesses—both "the instrumental witnesses (*şuhudu'l-hal*) who stood witness to the court hearing itself or its legality, and circumstantial witnesses (*udul*), who gave testimony in support of the litigants"[39]—played very important roles in the decision-making process in Ottoman courts. More recent research that revisits the arguments of conventional historiography successfully reveals the fact that witnesses constituted a select group of "honorable" people. They were generally composed of a well-defined group, mostly from among the well-off local notables with military and religious titles, as may be seen in seventeenth-century Aintab and eighteenth-century Çankırı and Kastamonu.[40] Thus, as part of the legal processes, law enforcement officials were very influential in the decisions of the *kadı*s, at least in the seventeenth and eighteenth centuries. When we take into consideration the particular involvement of law enforcement officials in major crimes, we find that matters related to the autonomy of the *kadı* become quite complicated.

An article in the *kanunname* of Süleyman I offers us some clues as to the basic principles of the administration of major crimes in the Ottoman penal system:

> If according to the customary law it is proved and evident that a person has committed a crime, he who serves as cadi shall give a certificate (*hüccet*) [to that effect] to the executive officers (*ehl-i 'örf*). In accordance with the certificate, the executive officers shall hang the person who incurs hanging and cut off a limb of the person who incurs the cutting off of a limb. And the cadi shall not prevent this and shall not cause the punishment to be postponed [but] let the punishment be carried out at the place where the crime was [committed].[41]

In spite of the fact that this article in the law book of Süleyman set the rules for inflicting capital punishment, it actually constituted a schema of the organization of the Ottoman legal system in principle. Furthermore, since capital punishment was one of the discretionary punishments (*ta'zir*) under

38 Jennings, "Limitations of the Judicial Powers," 257.

39 Canbakal, "Ayntab at the End of the Seventeenth-Century," 130.

40 Ibid., 123–149; Ergene, *Local Court, Provincial Society, and Justice*, 28–29.

41 Article 88 in Heyd, *Studies in Old Ottoman Criminal Law*, 118.

the jurisdiction of the politico-administrative power, this article also gives us an idea about how other discretionary punishments were handled in the Ottoman legal system.

The "private" compilation of a law book by Tevki'i Abdurrahman Pasha from the late seventeenth century[42] clarifies this division of jurisdiction further:

> [The cadis] are to carry out the laws of *shari'a* … but are ordered to refer matters relating to public order (*nizam-ı memleket*), the protection and defence of the subjects, and the capital or severe corporal punishment (*siyaset*) [of criminals] to the [local] representatives of the Sultan (*vükela-i devlet*) who are the governors in charge of military and serious penal affairs (*hükkam-ı seyf ü siyaset*).[43]

While the roles of the governor and the administrative-military officials in the jurisdiction of serious crimes have been noted by scholars who work on Ottoman court records covering various time periods, there are still very few studies on the actual working of the penal administration in the Ottoman Empire. The scant valuable research we have on the subject affirms once more that we must investigate the *kadı*'s autonomy and authority through his relationship to the other adjudicative and executive authorities.[44] To put it another way, they show that governors and other administrative authorities should be situated in the larger discussion of judicial discretion in order to better evaluate the *kadı*'s legal autonomy, hierarchy of powers in the legal system, and criminal administration in the Ottoman Empire, especially in the late early-modern period. I argue that such an analysis will help us untangle the enigma of punishment in the court records to a great extent.

Research on court records reveals interesting information about the collaboration of governors and judges in the judicial administration. Eyal Ginio's

42 Tevki'i Abdurrahman Paşa, "Tevki'i Abdurrahman Paşa Kanunnamesi," Milli Tetebbular Mecmuası, no. 3 (1331/1913). For detailed information, see Chapter 1.

43 Heyd's translation of the statute is used here. Heyd, *Studies in Old Ottoman Criminal Law*, 209.

44 Since some of the literature on this subject is covered in the discussion on petitioning in Chapter 2, this chapter concentrates on the hierarchical relationship between the courts, councils, and criminal administrators in the legal processes. Ginio, "The Administration of Criminal Justice"; Ginio, "Coping with the State's Agents"; Ursinus, *Grievance Administration*; Gradeva, "On Judicial Hierarchy in the Ottoman Empire"; Baldwin, "Islamic Law in an Ottoman Context"; Aykan, *Rendre la justice à Amid*; Tamdoğan, "Sulh and the 18th Century Ottoman Courts of Üsküdar and Adana"; "Qadi, Governor and Grand Vizier."

work on eighteenth-century Ottoman Salonica pioneered such an inquiry based on court records and demonstrated that there was a more systematic relationship between adjudication and execution of punishments in Ottoman criminal administration in the late early-modern period.[45] He states that "the *kadı*'s power to independently inflict punishment was quite limited" in eighteenth-century Ottoman Salonica. He argues that the *kadı*'s judgment—in a minority of cases on which he passed sentence—relied on the authority of outsiders, namely the governor and the mufti. He provides several examples in which the *kadı* either sentenced the culprit or acquitted the defendant when the litigant presented a *fetva* issued by the local mufti. Furthermore, he reveals that many punishments, the most prevalent of which were imprisonment and banishment, were actually inflicted by the politico-administrative authorities; either by the sultan himself or the governor—in the latter case, the *kadı* issued the verdict in the presence of the governor.[46] Although Ginio's article defined a rudimentary mechanism of control between the judge and the governor (as well as the mufti), in his later work he explicitly defines the revision of a verdict from a local judge by the provincial judge (usually in the presence of the governor) as a legal appeal.[47] He offers examples of the re-adjudication of the decision of a local court (Kavala or Florina) in the provincial center (Salonica) either before the Salonican *kadı* or in the council (*divan*) of the governor or both.[48] He also highlights the fact that the first and mandatory step in the appeal process was the submission of a petition to the Imperial Council to review a previously issued verdict; appeals generally resulted from the incompetence of the local court or the defiance of a higher authority.[49]

Since scholars of Ottoman history have identified only two registers of governors' *divan*s (Rumeli and Cairo) so far,[50] deriving generalizations about the function of these councils is not possible yet. Michael Ursinus shows that the Sofia court records at the turn of the eighteenth century contain records of court hearings (*hüccet*s) held in the council of the lieutenant provincial governor (Rumeli *kaymakamı*) under the judicial supervision of the provincial *kadı* in Manastır. These registers were held in response to people's petitions to the governor, as the petitionary registers of the Imperial Council were also compilations of the responses to people's petitions. The provincial *kadı* registered

45 Ginio, "The Administration of Criminal Justice."

46 Ibid., 192–195.

47 Ginio, "Coping with the State's Agents."

48 Ibid., 46–54.

49 Ibid., 49.

50 See Chapter 2 for more information on these studies.

these cases in the court registers of Manastır at the turn of the eighteenth century in a separate volume which Ursinus called the Manastır "Record Book of Complaints." Ursinus defines the differences between the hearings recorded in this register and regular court hearings as the following:

> By the late seventeenth and early eighteenth centuries (if not earlier), the governors of the province of Rumelia held formal court meetings within the *Divan-i Rumili* to answer petitions submitted by the local population. These meetings were convened in the governor's presence and attended by some of their own high-ranking officials, but acted under the immediate direction of the local kadi. Such hearings may have been considered distinct from (if not higher in rank than) the regular court meetings in the *mahkeme*. The extraordinary nature and special status of these meetings seem to have been emphasized in the sources by the words "weighty" or "important" (*hatir*). On the other hand, the court hearings in the *Divan-i Rumili* around the turn of the eighteenth century are invariably described as sharia court hearings, just like those taking place in the *mahkeme* under the local kadi. But the convening of these sharia court hearings in the *Divan-i Rumili*, and their attendance, as *şühudulhal*, by several of the vali's own courtiers and officials suggest that such hearings belong into a category of their own. They were regarded as distinct from the regular meetings of the *meclis-i şer* whose primary function was the safeguarding and implementation of the Sacred Law. It would appear that the principal purpose of the court hearings convened in the Chancery of Rumelia was to redress wrongdoing which the regular judicial system itself had proved unable to resolve or was unwilling to address, or had not been charged with for a variety of reasons.[51]

In addition, Ursinus points to the (near) absence of the *kadı* and his functionaries as well as other *ulema*, an observation that he gleaned from procedural details in this "Record Book of Complaint." This absence contrasts with the dominance of the entourage and personnel of the lieutenant governor among the personnel and the witnesses in the council, and thus highlights the difference between the *divan* and the regular *mahkeme*.[52] Nevertheless, the *kadı*s seem to have participated in the *divan* hearings as notaries, to keep their records. Yet, he also points to the fact that the participation of the provincial

51 Ursinus, *Grievance Administration*, 38.

52 Ibid., 34–35.

kadı in the governor's council indicates a further integration of the *kadı* and his court into the civil administration of *mazalim*/*siyasa* justice in the Ottoman provinces.[53]

Rosistsa Gradeva also shows that by the end of the seventeenth century the provincial *kadı* often took part in sessions of the council (*divan*) of the provincial governor which, she says, also acted as an intermediate appellate institution in Rumelia at the end of the eighteenth century.[54] First, by juxtaposing seventeenth-century Sofia court registers with registers of important matters (the *Mühimme Defters*) Gredava demonstrates that *molla* judges (those with a *mevleviyet*[55]) held a supervisory function. Gradeva's study documents the *administrative* supervision of the *kadı* of Sofia over the ordinary *kadı*s of smaller administrative units (*nahiye*s and *kaza*s) in the province of Rumelia. Through a variety of examples she shows that the *kadı* of Sofia oversaw and summarized, most of the time, the work done by his colleagues, that is, mainly, the governor (*vali*) of Rumelia or the commissioner from the Imperial Council (*çavuş* or *mübaşir*), "primarily (perhaps exclusively) in the fields of public order and security, the *timar* system, and the collection of taxes, that is, fields regulated generally by *kanun*."[56] Second, and more importantly for our discussion here, she brings other examples in which the *kadı* of Sofia *judicially* supervised and reviewed the decisions of the lower *kadı*s and *naib*s. While some of these cases were transferred from other jurisdictions to the Sofia judiciary by imperial order as a result of petitions from one of the parties involved in the previous litigation, some came to the provincial court (by the litigants or the lower *kadı*s) without any imperial order.[57] By following Ursinus' line, she also argues that the involvement of *kadı*s with the *mazalim* on the provincial level enhanced their oversight responsibility vis-à-vis their colleagues in smaller places. At the *eyalet* level, the provincial *kadı* of Sofia used his judicial prerogatives for review usually by cooperating with the governor of Rumeli in the latter's capacity as representative of the sultan in the province.[58]

In contrast to the findings of Ursinus, the second study on the registers of the governor's council, James Baldwin's dissertation on dispute resolution in late seventeenth-/early eighteenth-century Cairo reveals a very different picture of the judicial functions of the governor's *divan*. While twelve registers of

53 Ibid., 33–38.

54 Gradeva, "On Judicial Hierarchy in the Ottoman Empire," 296–298.

55 The jurisdiction of a high-ranking *shari'a* judge in the Ottoman Empire.

56 Gradeva, "On Judicial Hierarchy in the Ottoman Empire," 296.

57 Ibid., 288–292.

58 Ibid., 297.

the governor's *divan* of Cairo (al-Diwan al-'Ali) exist in separate collections (*sijillat al-diwan al-'ali*), two from the eighteenth century and the remainder from the early to mid nineteenth century, Baldwin points to the fact that thus far researchers have worked on the registers from the eighteenth century, but not "in order specifically to study the operation of the Diwan and its place within Cairo's system of shari'a courts."[59] This is also an indication that the *mazalim* or *siyasa* jurisdiction was not often incorporated into the analysis of Islamic legal systems since the conventional understanding of Islamic law considered these tribunals beyond or "outsider" the *shari'a*, as discussed in Chapter 1.

Baldwin investigates the earliest *divan* register of Cairo that has survived; this dates from 1741–43. While the appearance of the *divan* registers in 1741 might represent a change in record-keeping practices,[60] by looking at earlier legal documents produced by the *divan* he argues that its judicial functions preceded the 1740s.[61] "The composition of the *divan* in its judicial mode usually consisted only of the governor and a kadi" who was either the chief *kadı* of Egypt (the *qadi al-quda*) or the *divan*'s own *kadı* (the *qadi al-diwan*).[62] In contrast to other researchers' observations about the judicial and executive involvement of the governor's council in mostly criminal matters, especially those concerning public order, Baldwin asserts that the majority of disputes adjudicated in the governor's *divan* of Cairo were property issues and that other cases, such as illegal enslavement and mundane homicide, which do not fit into *siyasa* jurisdiction.[63] Furthermore, the legal procedures carried out for adjudication in the *divan* were not different from those followed by the other Ottoman *shari'a* courts. In other words, the *divan* had public hearings in the presence of the litigant and the defendant and accepted testimony or court-issued evidence in contrast to the bureaucratic procedures of the *mazalim* tribunals that were based on the acceptance of the petitioner's request.[64] Yet, the *divan* seems to have handled cases of a more important nature because, Baldwin argues, either it did not hear all the cases brought by the litigants or people brought the more important cases to the *divan*. However, according to

59 Baldwin, "Islamic Law in an Ottoman Context," 35–36.

60 The coincidence of the appearance of the *divan* registers of Cairo and those of the Imperial Council and their organization based on provincial distinction (provincial registers of imperial rescripts) is discussed in Chapter 2 with regard to the restructuring of bureaucracy in the Ottoman Empire.

61 Baldwin, "Islamic Law in an Ottoman Context," 37.

62 Ibid., 35.

63 Ibid., 40–41.

64 Ibid., 44–45.

the researcher, despite the relative difference in their caseload, there was no formal division of jurisdiction and procedural relationship between the governor's *divan* and the court of Cairo.[65] Finally, Baldwin argues that the governor's *divan* was not an appeal court: "Cases could be initiated either in a *shari'a* court or in the Diwan, and the vast majority of the cases in the Diwan's first register show no sign of having been initiated elsewhere."[66] In that sense, the governor's *divan* of Cairo seems to have worked as a court parallel to other *shari'a* courts, with the only exception being the presence of the governor. Therefore, Baldwin argues that the advantage of applying to the governor's *divan* was that the presence of the governor as the representative of the military executive power facilitated the enforcement of the *kadı*'s judgment.[67] Moreover, maybe more important than the enforcement prerogatives, the governor's *divan* was the central venue of provincial politics in which important provincial actors such as bedouin shaykhs, beys, regimental soldiers, and the governor negotiated power through the mediation of law.[68]

In his recent work on eighteenth-century court records of Amid Yavuz Aykan also claims that the *kadı* court of Amid, the provincial center of Diyarbekir, did not function as a court of second-instance for the people in the province of Diyarbekir. In contrast to Gradeva's argument about the judicial prerogatives of the provincial *kadı*, he asserts that the superiority of the *kadı* of Amid over the lower *ulema* under his jurisdiction only came from the administrative responsibilities of a typical *mevleviyet* judge of a provincial center and that these functions did not cover the judicial review of the verdicts of other *kadı*s. As proof, he quotes a command (*buyuruldu*) from the governor of Diyarbekir, dated 1765, that forbids the inhabitants of Mardin from directly applying to the court of Amid, as they used to do, since they had their own court in Mardin. He shows this command as evidence that the court of Amid does not fit into Gradeva's picture of the appellate functions of the provincial court.[69]

65 Ibid., 42–44.

66 Ibid., 43–44.

67 Ibid., 46.

68 Ibid., 47–74.

69 Aykan, *Rendre la justice à Amid*, 52. However, the mention of the governor's command in relation to the previous habits of the inhabitants of Mardin and members of certain tribes, who were accustomed to applying directly to the court of Amid instead of the court of Mardin also indicates that the people of Mardin used to apply directly to the court of Amid. Furthermore, encouraging the utilization of the court of Mardin as a court of first instance does not categorically exclude the option of using the court of Amid as an appeal court (of second instance). However, the governor's command quoted by Aykan

Yet, he also acknowledges that people of Diyarbekir brought unresolved disputes directly to the governor's *divan* for several reasons. However, he claims that if the people of Harput (an adjacent town under the control of Amid governor) brought their cases to the attention of the governor's *divan*, the governor generally forwarded the cases back to the *kadı* of Harput with an usher (*mübaşir*) to supervise the enforcement. If the *kadı* was not able to resolve the issue, then the governor would recall the parties for a hearing at the governor's *divan*.[70] Yet, Aykan's discovery of the original petitions registered in the court records of Harput reveals interesting parallels between the workings of the Imperial Council and the governor's *divan* of Amid.[71] Aykan, in fact, states that the intervention of the governor's council of Amid in the legal sphere upon the request of petitioners is modeled after the Imperial Council.[72] Both councils seemed to issue "commanding guidance" on how issues should be resolved, mostly through the agency of the usher appointed to supervise and enforce the law.

Aykan also notes that the governor took care of criminal cases in his *divan* but called the provincial *kadı* to be responsible for adjudication when he needed to give judgment. Thus, he asserts, in parallel to Baldwin's argument, that the petitioners used the governor's *divan* as a court in which the presence of the governor was central. In other cases, he notes, the *kadı* acted as an expert guiding the governor in the application and interpretation of the *shari'a* and as a notary who registered the hearings of the governor's *divan*.[73] In the execution of a bandit named Sarıbeyoğlu at the sultan's request, he shows that the governor even asked for a *fetva* from the mufti to legitimize his decision. Thus, he argues that the governor had to cooperate with either the mufti or the *kadı* in giving judgment.[74] In sum, Aykan claims that people preferred to send their cases to the Amid *divan* to employ the executive power of the governor when they requested execution of the punishment against those who harmed them, rather than appealing to it for previous injustices.[75] Yet, he asserts that the Imperial Council on which the *divan* of Amid was modeled served as an appeal court to either correct the malpractices of provincial officials, including the

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does not reveal whether it prevented people from applying to the court of Amid as a court of second instance (after having a first trial in the court of Mardin).

70 Ibid., 65.

71 Ibid., 68.

72 Ibid., 86.

73 Ibid., 59.

74 Ibid., 63.

75 Ibid., 71–72.

adjudicative and executive officials, or resolve the unresolved problems at the request of petitioners.[76]

Işık Tamdoğan, who compared the eighteenth-century court records of Üsküdar and Adana in order to investigate the relationship of the *kadı*s of Üsküdar and Adana with the grand vizier in the Wednesday *divan* of the Imperial Council and the governor in the *divan* of Adana respectively, observes the *kadı*s' clear acknowledgment of the executive functions of the grand vizier and the provincial governor who were responsible for public order.[77] In that sense, the *kadı*, in both cases, sent *ma'rûz* letters "to inform the executive power so that the latter would further work through the case and most probably would decide and apply the sanction."[78] Thus, according to Tamdoğan, the governor had the discretion to determine the type and severity of punishment after the facts were established in the *kadı* court. However, we have also seen examples of petitions complaining about the governor and his executive officers arresting and punishing people without court trials.[79] Tamdoğan concludes that the *divan* of the provincial governor functioned as a *mazalim* court, by exercising "the authority of an executive power by applying the sanctions against criminals and by holding audiences" at his residence.[80] Yet, in less serious cases, or civil cases, such as taxation and issues concerning public morality, she argues that the governor's *divan* seems to have been used as the last resort for those who already tried other institutions and courts, and there the governor needed the judgment of the *kadı* to legitimize his execution of the punishment.[81] While Tamdoğan does not discuss whether the *divan* of Adana functioned as an appeal court for the revision of previous judgments by the people of Adana when they used it as the last resort, she confirms that "the provincial

76 Ibid., 82–86.

77 Tamdoğan, "Qadi, Governor and Grand Vizier." In an article written specifically to investigate amicable settlement cases, she makes similar observations on the cooperation between the executive and adjudicative authorities by comparing the registers of these two courts. See, Tamdoğan, "Sulh and the 18th Century Ottoman Courts of Üsküdar and Adana."

78 Tamdoğan, "Qadi, Governor and Grand Vizier," 245–250.

79 Hüseyin's petition to the Imperial Council about the murder of his son, who died (without a previous trial) after being beaten by executive officials, was one of these examples, discussed in Chapter 2. BOA, A.DVN.ŞKT, folder 5, petition 11 (1156/1743). Ginio gives such examples of extra-judicial executions of "punishment" or torture by the administrative authorities in eighteenth-century Salonica. Ginio, "The Administration of Criminal Justice," 202–204.

80 Tamdoğan, "Qadi, Governor and Grand Vizier," 252.

81 Ibid., 253.

governors acted as a replica of the Grand Vizier in Istanbul" and both "were direct deputies of the Sultan."[82] In that sense, she does not seem to observe a major difference between the appellate functions of the governor's *divan* and the Wednesday *divan* of the Imperial Council, as Aykan observed for the *divan* of Amid and the Imperial Council.

Even though the relationship of the district *kadı*s in Istanbul and their courts to the Imperial Council was not identical with the relationship of the provincial and lower *kadı*s to the governor's *divan*, the example of Istanbul still offers us more nuanced information about the nature of the collaboration or judicial interaction between the adjudicative and executive powers. Tamdoğan's study of the separate volumes of the records of the Üsküdar court, which are registers of *ma'rûz* documents,[83] is remarkable in that sense. This study shows that the *kadı* of Üsküdar kept separate records of specific letters (*ma'rûz*) submitted to the grand vizier about the cases that were delegated specifically to his court by the latter. The grand vizier held a meeting with the four district *kadı*s of Istanbul (Istanbul, Eyüb, Galata, and Üsküdar) once a week on Wednesdays (the Wednesday assembly) to distribute the cases petitioned to the Imperial Council by Ottoman subjects and officials concerning the adjudication of their districts.[84] According to Tamdoğan, "through the ma'rûz channel the district qadi informed the Grand Vizier about the ways in which the cases were concluded."[85] Her study reveals that the Üsküdar court compiled two volumes in 1763, one for the *ma'rûz* documents mentioned above and one for regular case records (*i'lam*). The difference between the *ma'rûz* documents and the *i'lam* is that the former did not include case witnesses (*şuhudu'l-hal*) and that each document bares, at the head, a note taken by the scribe as "*ma'rûz*," and concludes with the comment, "to be transmitted to your highness" (huzur-u alilerine i'lam olundu).[86] This information implies that *ma'rûz* documents were more a kind of report to the higher authorities than a protocol of a court hearing.[87] Interestingly enough, the total number of cases registered in the

82 Ibid., 253–254.

83 *Ma'rûz* refers to any kind of letter in Ottoman bureaucratic jargon sent by a subordinate to a higher authority. Ibid., 240.

84 Tamdoğan, "Sulh and the 18th Century Ottoman Courts of Üsküdar and Adana," 58. Mumcu, *Hukuksal ve Siyasal*.

85 Tamdoğan, "Qadi, Governor and Grand Vizier," 240.

86 Ibid. "Sulh and the 18th Century Ottoman Courts of Üsküdar and Adana," 60.

87 However, the researcher also questions "whether the absence of the names of witnesses in *ma'ruz* documents indicates that there were no such witnesses present at the procedure or that their names simply were not recorded." See Tamdoğan, "Sulh and the 18th Century Ottoman Courts of Üsküdar and Adana," 59, n. 6.

volume composed of *ma'rûz* documents (805) is much larger than the *i'lam* records (568) in the other volume.[88] The study shows that the *ma'rûz* volume mostly included cases of bodily harm and murder, that is to say, cases concerning criminal law, together with a few cases of injury, theft, and moral misconduct.[89] Tamdoğan also mentions that even the criminal cases that were in fact brought directly to the court of Üsküdar were reported to the grand vizier's *divan* once they have been concluded.[90] In other words, criminal cases were, one way or another (i.e., through the *kadı* himself or the petitions of the other actors), reported to and monitored by the grand vizier. As a result, she argues that such cases were forwarded to the Wednesday assembly of the grand vizier because the latter was the center of executive power in the capital city. He also had the authority to collect the fines, which was a common form of punishment for someone convicted of a criminal act.[91]

Similarly, Betül Başaran documents separate court registers labeled *i'lamat* namely collections of cases (between 1789 and 1793) that were sent on to the Imperial Council by the judge or deputy judge of Istanbul.[92] Just as the judge of Üsküdar compiled the notifications that he sent to the Wednesday *divan* in a separate volume, the court of inner Istanbul (*Istanbul Mahkemesi*) and the court of the deputy judge of Istanbul (*Istanbul Bâb Mahkemesi*) submitted notifications (*i'lam*) to the Imperial Council and compiled them in separate volumes.[93] She claims that referring matters of public order directly to the Imperial Council for approval and the issuance of an imperial order after the establishment of the facts in the *kadı* courts was a standard procedure in Istanbul in the eighteenth century.[94] Among the cases of public order, the most frequently encountered in these registers were requests for the expulsion of undesirable women and families who were involved in immoral behavior, complaints against religious dignitaries, *sufi* masters, devotees, *medrese* students, bachelors, and outsiders who were considered threats to the public order of the city and thus frequently inspected by government authorities.[95] Başaran reaches the conclusion that "the anxiety of central administration

88 Ibid., 61.

89 Tamdoğan, "Qadi, Governor and Grand Vizier," 243, 254 n. 7.

90 Ibid., 243.

91 Ibid., 243–244.

92 Başaran, *Selim III, Social Control and Policing in Istanbul*, 187–213.

93 Başaran used registers 59, 61, and 62 of the Istanbul court and register 309 of the Istanbul Bâb court, which were specifically labeled *i'lamat*. See, ibid., 187, n. 94.

94 Ibid., 187.

95 Ibid., 187–213.

over matters of public order and morality is evident in the legal practices involving the handling of the *ma'rûz* cases."[96]

While Fariba Zarinebaf does not mention specific registers compiled for the notifications of judges to the Imperial Council, she observes that in eighteenth-century Istanbul the *kadı*s had become less involved in the prosecution of criminal cases. According to her, the jurisdiction of the Imperial Council increased and prosecuted crime more often while the *shari'a* courts in Istanbul increasingly specialized in family and property disputes.[97] Yet, she also asserts that "the Imperial Council usually consulted the *kadı* on the sentences to be issued to the convicts."[98]

My study and investigation of the imperial decrees in the Anadolu *Ahkam* registers and the court records of Ankara and Bursa in the mid-eighteenth century indicate that local judges' decisions were subject to judicial review. Neither the people who petitioned the Imperial Council after a local court trial nor the Imperial Council that redirected a case to the same or another judge (or both at the same time) considered the first trial final. The cases analyzed in Chapters 2 and 3 suggest that, by applying directly or asking local authorities to forward their cases to the Imperial Council, petitioners wanted to instigate a review or at least request supervision of the legal process by higher authorities. Even if it was only for the involvement and supervision of the executive officials in the judicial process, as Aykan and Tamdoğan indicate for the petitions sent to the governor's *divan*, the petitioners' act of transferring a case to a higher authority (either the governor or the Imperial Council) started (if they were successful and received a response [decree]) a process of review or supervision of the legal procedure. Furthermore, the existence of a great number of imperial decrees that forwarded a case submitted by a petitioner to more than two judges (and sometimes to the governor as well) indicates that the Imperial Council sent the case to the one of these judges for review or at least for supervision of the other's sentence.[99] In fact, in their requests many petitioners expressed the impossibility of prevailing against their opponents at the local level, as we discussed in Chapters 2 and 3. In those cases, it is not always clear whether they complained about local justice because of the opportunistic cooperation between the power holders and judges or because the

96 Ibid., 213.

97 Zarinebaf, *Crime and Punishment in Istanbul*, 145, 177.

98 Ibid., 145.

99 Ginio also provides examples from eighteenth-century Salonica of such revisions of judgment, ordered by imperial decree in response to petitions from appellants. Ginio, "The Administration of Criminal Justice," 198–199.

*kadı*s were incapable as a result of other pressures. Yet, many others petitioned after a court trial was held in their locality. In those cases, we observe that the Imperial Council often sent these cases back to two judges and an executive officer or sent an usher from the imperial palace. Even if this was not necessarily meant to reverse a previous judgment (if there was a judgment), the imperial order was apparently intended to supervise justice at the local level either through an usher or a higher authority in the region.

My research in juxtaposing the registers of the *kadı* courts of Ankara and Bursa with the Anatolian petitionary registers of the Imperial Council (as well as the petitions themselves) reveals that many serious criminal cases were in fact reported to the Imperial Council mostly by *kadı*s and sometimes by local executive authorities including governors. To understand the Ottoman penal system in the eighteenth century, this may be even more important than the use of the Imperial Council by subjects as an appellate court. In certain criminal cases presented thus far, the petitioners asked the *kadı* in the local court or the (lieutenant) governor in his *divan* to forward their cases to the Imperial Council, as in the example of the rape case of Emine, discussed extensively in Chapter 2.[100] In some other cases, as Tamdoğan demonstrates in the relationship between the *kadı* of Üsküdar and the Wednesday assembly of the Imperial Council, the local *kadı* sent a letter to the Imperial Council reporting the established facts about the case, without any judgment. Alternatively, if the *kadı* gave a verdict to penalize a serious offender, which happened very rarely in our sample, he reported these judgments to the Imperial Council, as in the case of Mustafa, whom the court of Ankara established, through testimonies as a habitual criminal; he received a *fetva* about his prosecution from the mufti and was sentenced to death in so far as an imperial order was obtained, as explained in Chapter 3.[101] This example of the *kadı* sentencing Mustafa to the death penalty, but only with the authorization of a mufti and the sultan correlates with Ginio's observation that the *kadı*'s judgment on criminal disputes mostly relied on the authority of the mufti or the executive power (the governor or the sultan). My study and others strongly indicate that in eighteenth-century Ottoman Anatolia crimes against public order committed by habitual criminals (*sa'i bi'l-fesad*, fomenters of corruption) and serious offenses such as murder, serious bodily harm, and severe sexual violence, or, at least, the punishments for these crimes, were to be reported to the Imperial Council.

100 BOA, Anadolu Ahkam Defteri 1, case 399 (Şaban 1155/October 1742).

101 ACR, 12, 58 (Şevval 1154/January 1742).

Alongside the Imperial Council, which functioned as a *mazalim* court, the council (*divan*) of the governor of Kütahya (the regional capital of the province of Anatolia) played an important role in the administration of criminal justice. Here and there we find interesting documents which demonstrate that the inhabitants of various Anatolian cities submitted petitions to the governor of Kütahya and trials were held (or supposed to be held) at his council.

For instance, a Kütahya deputy governor (*mütesellim*) sent the sergeant of police (*bölükbaşı*) in May 1743 to Bursa to apprehend an "outlaw," as his litigants were waiting for him in Kütahya to proceed with the trial.[102] The entire case concerns a controversy between some of the inhabitants of Baba Sultan village and three men who supported the "outlaw." The litigants in the Bursa court were actually these three men who did not want to surrender the "outlaw" to the police officer of the Kütahya governor. When they (and the rest of the village inhabitants, according to them) sent the police officer away from their village by force in order to avoid surrendering the accused, the latter arrested these men outside the village and summoned them to the court in Kütahya. As a result, these three men gave two hundred sixty *guruş* to the police officer (as payment for an amicable settlement) for their release. They claimed this money at the Bursa court from the village community by saying that the latter had guaranteed reimbursement in advance, however, the community refused to pay the amount. As a result, these three men obtained an order from the Kütahya governor, for a court trial to be held in the Bursa court. The court record in question is in fact the registry of this trial held in the court of Bursa. The Bursa court acquitted the community from the charge since they rejected the accusation and the three men confessed that they had actually given money to the governor's agent without prior authorization from the community.

In the record given, the issue between the litigants in Kütahya and the "outlaw" in question in Bursa is not clear. It appears that a trial never took place in the governor's court in Kütahya since some of the inhabitants opposed the surrender of the "outlaw" to the governor's agent and an interesting controversy started among the supporters of the "outlaw," the village community, and the governor's agent that ended up in a lawsuit in the Bursa court. Interestingly, however, we learn from the court record that these men who did not surrender the "outlaw" and bribed the governor's agent in the name of "amicable settlement" also applied to the Kütahya governor to get an order for reimbursement by the community. Then, even though they obtained the order they asked for, they were unable to get the money from the community. If we leave aside all

102 BCR, B121, 90 (2 Rebiü'l-evvel 1156/26 April 1743).

the details of the trial in question, we see that two petitions involved in the trial were submitted to the governor of Kütahya, and one of them succeeded in ensuring that the dispute was heard in the council of the Kütahya governor.[103]

The juxtaposition of different legal documents, i.e., imperial registers, court records, and petitions, concerning Ankara and Bursa also indicates the presence of a successive judicial review mechanism—if not a full-fledged system yet—in the mid-eighteenth century. As both the provincial judges (sub-province) of Ankara and Bursa held *mevleviyet*s, they seem to have supervised and reviewed the legal transactions of the lower judges of the smaller districts of Ankara and Bursa. For example, the decrees registered in the Anatolian registers of imperial rescripts (Anadolu *Ahkam Defterleri*) were sometimes addressed to both the *molla* of Bursa and the *kadı* of Mudanya (a district of Bursa) and generally to the deputy lieutenant governor (*mütesellim*) of the province as well. The sub-provinces of Ankara and Bursa were also under the larger jurisdiction of Kütahya, the regional capital of the province of Anatolia.

We can find some clues of this successive review system in the following examples taken from the court records. For example, in the Ankara court records of 9 March 1742 there is a reference to a previous petition submitted to the governor of Kütahya by Elhac Hüseyin, who claims that Elhac İsmail owed him one hundred *guruş* and had seized one of his horses.[104] Hüseyin obtained a rescript (*buyruldu*) from the Kütahya governor ordering that a *shari'a* trial be held in the court and for İsmail to pay compensation. In fact, Mehmed Ağa, the usher (*mübaşir*) for the Kütahya governor, came to the Ankara court to bring the order and make sure that the trial was held. In another court case from Ankara, recorded only eighteen days after the above-mentioned case, Nasuh, who was accused of raping Saime from the Çubıkabad district of Ankara, was summoned to the Ankara court by Mehmed Ağa, the same usher for the governor of Kütahya.[105] Although the court record did not mention a petition submitted to the governor by the litigant, one can assume that it was submitted because it states that the usher summoned the man by a rescript concerning this specific case.

In a case from the Bursa court records, a Christian litigant came to the court on 18 May 1742 to register the amicable settlement (*sulh*) that he had

103 The dispute between the "outlaw" and his litigants in Kütahya might still have been heard at the governor's council. The fact that these three men went to get an order from the Kütahya governor to get their money back from the community indicates that the first dispute had not yet been finalized.

104 ACR, 121, 124.

105 ACR, 121, 125 (20 Muharrem 1155/27 March 1742).

concluded with the defendants who were originally accused of inflicting injury and cursing him; he mentions that he had previously petitioned the governor of Kütahya. He added that as a result of his petition the governor sent a foot soldier (*çuhadar*) as an usher with a rescript ordering that the case be heard in the Bursa court.[106] Thus, it appears that the governor of Kütahya collected cases submitted to him by petitioners (and maybe by local *kadı*s) and sent his usher to facilitate local court hearings of the cases in question, or appointed his law enforcement officer to bring the accused to his own council in Kütahya. In this sense, the workings of the governor's council and its relationship with local *kadı*s were not dissimilar to those of the Imperial Council.

In sum, these and other examples in this section show that the judicial authority of the local *kadı*s in the Ottoman legal administration in the eighteenth century was neither limitless nor autonomous. The Ottomans created a system of checks and balances through a web of judicial hierarchy and through the mutual control of the executive and adjudicative powers that seem to have crystallized by the eighteenth century. On the one hand, this web indicates that provincial *kadı*s, like the *kadı* of Ankara and Bursa, who had a higher position in the judicial hierarchy, were incorporated to a greater extent into the politico-administrative jurisdiction (*siyasa*); on the other hand, it reveals that the Ottoman central power was continually denied the ability to fully delegate its judicial authority to the judges in general.

An Alternative Way to Track Punishment? Traces of Punishment in the Interplay between the Kadi and the Higher Authorities

Given that the *kadı*'s authority was bound by other judicial actors in a pluralistic yet hierarchized judicial system and therefore his verdict was not necessarily the only determining factor in decisions of punishment, in order to gain a comprehensive picture of the penal system as a whole we must examine the interplay between the various legal actors and institutions, and follow their tracks through the legal documents. Ideally the first alternative source from which to determine punishments is the administrative records of the authorities who inflicted the penalties in the Ottoman legal system. However, as far as we know, executive authorities did not leave any evidence to show that they kept any such records of the penalties inflicted on the guilty parties.[107]

106 BCR, B121, 19 (13 Rebiülevvel 1155/18 May 1742).

107 No punishments were recorded in the "Record Book of Complaints" of the Rumeli governor that Ursinus examined. See Ursinus, *Grievance Administration*.

The second alternative involves looking in the court records for certificates submitted by the *kadı* to the executive officers ordering them to enforce the punishment. As explained, the Ankara and Bursa court records are full of certificates such as *hüccet*s with depositions and *i'lam*s with the statement that the sentence was delivered. Unfortunately, it is not possible to see from the records to which executive authorities these certificates were submitted or for what reason. In this study I document only one example of such a certificate; it was addressed to the local janissary officer by the judge of Bursa and is the order for the execution of capital punishment in a case of sodomy.[108]

Thus, in eighteenth-century Anatolia, besides the very rare instances for which the judgment and punishment delivered by the *kadı* were clearly recorded, the richest documentation of punishments handed down is the correspondence between the Imperial Council and the provincial judicial authorities on criminal cases registered in the court records. Judges recorded in the court registers the imperial decrees addressed to them and to the executive authorities under their jurisdiction. Orders and correspondence coming from other higher authorities, for example from the governor general, were also recorded in these registers. In the court records of Ankara and Bursa analyzed here, these decrees and orders were registered separately from the court cases, often written upside down and starting from the back of the register. These records comprised almost half of these court registers.

These imperial decrees contained not only orders given to the authorities concerning the administration of their provinces, but also responses to the letters and petitions submitted to the Imperial Council, either by the judge in question or by Ottoman subjects under the particular *kadı*'s jurisdiction, responses that concerned the sentence and its execution in certain criminal cases. In cases that concerned serious crimes the Imperial Council generally asked the judge to supervise and oversee the carrying out of the sentence and ordered the executive authority in question to capture the culprit and inflict the penalty decided on (by the judge or the Imperial Council) or to send her to Istanbul for the execution of her punishment there.[109]

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108 BCR, B121, 38 (6 Rebiü'l-ahir 1155/9–10 June 1742). See Chapter 3. In the court records there are references, albeit rarely, to the executive authorities to whom the culprit was handed over for execution of the penalty, but we do not have records of certification such as the one given above. In this case, because of the severity and importance of capital punishment, the *kadı* ought to have given such a written certificate, as we discuss later.

109 For examples of imperial decrees for criminal cases recorded in the court records, see BCR, B166, 40B/1; BCR, B121, 244; BCR, B166, 24B/2; BCR, B166, 25A-25B and BCR, B166, 35A/2.

However, the other side of the correspondence between the Imperial Council and the provincial courts, which consisted of notifications written by judges to the Imperial Council, is difficult to track in the court records of Ankara and Bursa in the eighteenth century. In the Imperial Council there was a special council designated to follow the cases of Istanbulites, therefore, the court records of the juridical districts of Istanbul (Istanbul, Üsküdar, Galata, and Eyüp) have separate volumes that contain, exclusively, these "notifications" sent to the Imperial Council as explained above.[110] Unfortunately there is no evidence of such separate volumes, nor records of clearly identified notifications (*ma'rûz*) among other kinds of court records for cities other than Istanbul, not even for Ankara or Bursa.[111] Even though these special "notification" volumes of the Istanbul courts give us some idea of the punishments and their execution, at least those imposed in the Ottoman imperial center,[112] they do not address the relationship between the provincial courts and the executive authorities in the central government in relation criminal administration.

These notifications (*i'lam*), written as individual letters by the *kadı*s and received by the Imperial Council, are kept among other documents in the Prime Minister Archives. The petition folders investigated for this study for cases in

110 Istanbul courts appear to be an exception; they had clearly distinguished volumes of "notifications" as discussed in the studies of Tamdoğan and Başaran. Tamdoğan, "Sulh and the 18th Century Ottoman Courts of Üsküdar and Adana"; Tamdoğan, "Qadi, Governor and Grand Vizier"; Başaran, *Selim III, Social Control and Policing in Istanbul*.

111 Tamdoğan and Başaran share the same observation.

112 Abdülaziz Bayındır claims that the separate volumes of *ma'rûz* records are the only available records with valuable information on punishments in the Ottoman courts; he also states that other court records do not mention punishments because penalties were executed immediately unless they were forwarded to higher authorities. In fact, the *ma'rûz* examples that he provides from the Istanbul court records contain judgments of judges and deputy judges, including the imposition of punishments of retaliation, chastisement for *hadd,* punishment for false accusation of unlawful sexual intercourse, financial compensation (*diyet*) for bodily harm, as well as various discretionary punishments. Abdülaziz Bayındır, *İslam Muhakeme Hukuku* (Istanbul: İslami İlimler Araştırma Vakfı Yayınları, 1986), 22–26. Similarly, Uçar's transliteration of one of these volumes from the Üsküdar court records reveals that some notifications that were submitted to the Imperial Council contain judgments and discretionary punishments delivered by the *kadı*s for offenses such as cursing and attacking someone's honor, theft, bodily harm, and fornication. See cases 19, 79, 88, 105, 108, 304, 308, and 317 in Uçar, "Üsküdar Mahkemesi'ne," 98, 124–125, 129, 136, 137–138, 227–228, 229, and 233 respectively. These examples of penalties from the specific "notification" volumes of Istanbul court records help us to identify certain punishments inflicted for various sexual offenses, at least in the Istanbul region.

the mid-eighteenth century contained notifications written by various *kadı*s from around the empire. Furthermore, the imperial decrees recorded in the Anadolu *Ahkam* registers kept by the Imperial Council from 1742 onward also indicate whether the Imperial Council was notified of a given case through a letter from a *kadı*. In criminal cases, the notifications of local *kadı*s were sometimes used to get approval for the judgment/punishment imposed by the local court, while in other cases they were simply notifications of proceedings of the case heard in the local court and requests for advice from the Imperial Council on the final judgment. Thus, through these notifications it is possible to trace the reason the *kadı* forwarded a case to the Imperial Council and whether he asked for advice on the adjudication of the case or for approval of a penalty he had delivered for an established crime.

Finally, in addition to the petitionary registers of the Imperial Council we can use the *kal'abend* registers kept by the imperial bureaucracy in Istanbul between 1722 and 1841 as sources to track down punishments and give us valuable information on crimes punished by confinement in a fortress (*kal'abend*) or on an island (*cezirebend*), and the various forms of banishment.[113] The very fact that the Imperial Council kept records of imperial rescripts written for the banishment and imprisonment of culprits clearly shows that these punishments needed the "discretion" and approval of the political authority.

Under Whose Discretion was Sexual and Moral Order?

After exploring the structural reasons behind the scarce mention of punishments in the court records, and demonstrating the elastic nature of the division of labor between the *kadı* and the executive authorities and the extent of the *kadı*'s dependency on the administrative authorities responsible for the enforcement of punishment, this section concentrates on how this penal system worked in terms of governing sexual offenses in eighteenth-century Anatolia. Looking at punishments is actually looking through the "gaze" of power. They are vital to our understanding of how political power defined, categorized, and penalized the illicit.

As discussed in previous chapters, Ottoman political power used the politico-administrative jurisdiction (*siyasa shar'iyya*) quite extensively through the application of the *kanun* (imperial statutes). Since Islamic law in general and

113 These amount to forty-four large volumes for the time period mentioned. After 1840, new registers emerge with the name of *Nefy ve Kısas* (Banishment and retaliation); these were kept until 1903.

the Hanafi doctrine in particular paid more attention to regulating and protecting private legal relations (i.e., the claims of men); issues concerning public order, which were basically the domains of administrative, fiscal, and penal law were delegated to the political authority as the trustee of the public interest. Chapter 1 discusses the workings of Ottoman jurisdiction in the eighteenth century by concentrating on fiscal and administrative aspects of *kanun*. Chapter 4 also explores how sixteenth-century law books enabled the penalizing of sexual crimes through the discretionary authority of the politico-legal power by converting most of the punishments to *ta'zir*. The same chapter also reveals the fact that in the court practice of Ottoman Anatolia in the mid-eighteenth century the euphemistic term *fi'l-i şeni'* was utilized more frequently than the *shari'a* specific term *zina*. The current chapter explores the penal aspect of the Ottoman political jurisdiction by analyzing punishments imposed for sexual offenses in eighteenth-century Anatolia and thus demonstrates that Ottoman political power attempted to increase its "discretion" over crimes in general and sexual crimes in particular in proportion to its anxieties about public and moral order throughout the empire. In the following pages, I demonstrate how this discretion was legitimized in both normative (*fetva*s) and practical applications of law.

Sexual Crimes as Most in Need of "discretionary punishment" in Eighteenth-century Fetva Collections

The *fetva* collections of the eighteenth century clearly reveal the discretionary character of the penal regulations for sexual crimes at the time. The organization and categorization of discretionary punishments mostly under the term *zina* show that sexual crimes were considered most in need (among the other *hadd* crimes) of discretionary punishment. Since many of the questions concerning sexual offenses that were brought to the chief muftis did not fit the strict conditions of fornication defined by the *shari'a*, the chief muftis delivered their legal opinions in favor of discretionary punishment. Thus, the legal opinions of the eighteenth-century chief muftis reveal the way "discretion" and legal enforcement of moral order was legitimized through the active employment of the Islamic principle of *ta'zir*. *Fetva*s address instances of daily problems that do not necessarily fit into the strict framework of the *shari'a*. The chief muftis of the sixteenth century, such as Ebu's-su'ud, Çivizade, and Kemal Paşazade, often disregarded the prescripts of the manuals of Islamic law when it came to *zina* and allowed customary law or their own opinion to guide their judgment.[114] Although they remained within the borders of the *shari'a* with

114 Imber, "*Zina* in Ottoman Law," 190–203.

regard to the legal terminology they used, they often prescribed discretionary punishment for various sexual offenses rather than defining and penalizing them with the *hadd* punishment for *zina*. For example, Ebu's-su'ud prescribed discretionary punishment—severe chastisement and/or imprisonment—for most sexual assault cases as well as for sodomy and bestiality.[115]

In this study I analyze three *fetva* collections of the legal opinions of the chief muftis of the mid-eighteenth century. The first volume, *Behcetü'l-Fetava*, is a collection of the *fetva*s of Yenişehirli Abdullah (Abdullah Ebü'l-Fazl Abdullah bin Mehmed), who served as the chief mufti between 1718 and 1730.[116] The other two volumes, namely *Tuhfetü'l-Fetava*[117] and *Neticetü'l-Fetava*,[118] are collections of the the *fetva*s of various chief muftis between 1730 and 1750, after Yenişehirli Abdullah's service; these include the works of Mirzazade Şeyh Mehmed, Paşmakçızade es-Seyyid Abdurrahman, Damadzade Ebu'l-Hayr Ahmed b. Mustafa, Dürri Mehmed Efendi, Feyzullah Efendizade es-Seyyid Mustafa,[119] and Pirizade Mehmed Efendi.

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115 See his *fetva*s on sexual offenses in M. Ertuğrul Düzdağ, *Şeyhülislâm Ebussuud Efendi Fetvaları Işığında 16. Asır Türk Hayatı* (Istanbul: Enderun Kitabevi, 1983), 157–159.

116 Yenişehirli Ebü'l-Fazl, *Behcetü'l-Fetava ma'an-Nukul*. It was compiled by the chief mufti's own *fetva emini* (steward) Mehmed Fıkhi el-Ayni during his lifetime (1733–43). The *fetva*s of Yenişehirli were reorganized by his steward according to classical *fiqh* categorizations. *Behcetü'l-Fetava* was regarded as an authoritative source—one of the authentic *fetva* collections of a specific chief mufti, and it was frequently used during the following decades in the eighteenth century. See, Özel, "Behcetü'l-Fetava."

117 *Tuhfetü'l-Fetava*, Esad Efendi 589 (Süleymaniye Kütüphanesi). This is a collection of the *fetva*s of various chief muftis between 1730 and 1746. It was compiled by Kırımi Ömer b. Salih, who served as secretary to various chief muftis during this period. The collection cites the names of the chief muftis who delivered each *fetva*. For more information, see Şükrü Özen, "Osmanlı Döneminde Fetva Literatürü," *Türkiye Araştırmaları Literatür Dergisi* 3, no. 5 (2005), 265–266.

118 Dürrizade Mehmed Arif Efendi, *Neticetü'l-Fetava maa'n-Nukul* (Istanbul: Matbaa-i Amire, 1849). This collection was compiled by Ahmed Efendi on the initiative of the chief mufti Dürrizade Mehmed Arif Efendi during the reign of Selim III (1792–98) and published in 1849 with some amendments. It is collection of the *fetva*s of various chief muftis who served the Ottoman state, especially between 1730 and 1750 although it contains *fetva*s from later periods as well. The major chief muftis in this collection and *Tuhfetü'l-Fetava* overlap for the time period studied here although the *Neticetü'l-Fetava* covers a longer period. The only chief mufti whose *fetva*s were included in *Neticetü'l-Fetava* but not in *Tuhfetü'l-Fetava* is Dürri Mehmed Efendi, who served from 1734 to 1736. See, Özen, "Osmanlı Döneminde Fetva Literatürü," 268–270.

119 He served from 1736 to 1745, i.e., during the time period of this study.

In three of the *fetva* collections, sexual offenders received discretionary punishments almost exclusively under the section of fixed crimes (*hudud*) to which unlawful sexual intercourse (*zina*) belonged, according to the classical categorization of Islamic jurisprudence (*fiqh*). Although other sections of Islamic law manuals and *fetva* collections also contain individual prescripts concerning discretionary punishments, the only section in which *ta'zir* punishments were collected under a separate heading with extensive coverage was that of *hadd* crimes.[120] Moreover, because plenty of *fetva*s delivered by the chief muftis in favor of "discretionary punishment" did in fact concern sexual offenses, those who compiled the *fetva*s listed the section on "discretionary punishment" as a large amendment to the small number of *fetva*s on fornication (*zina*) and its fixed punishment.[121] This reveals that most of the time the fixed penalty was dropped and replaced by discretionary punishment in sexual offenses, since not all the elements of a fixed crime were fulfilled according to the *shari'a*.

The predominance of sexual offenses (over other issues of fixed crimes) under the *ta'zir* section explains why this section was situated right after fornication and the false accusation of fornication (together with alcohol consumption). If discretionary punishment was incurred for offenses that resemble fixed crimes but did not fulfill the requirements of the *shari'a* for conviction, then it appears, from the *fetva* collections of the eighteenth century, that sexual offenses were considered the most in need of such a procedure. To put it another

120 In fact, the list of discretionary punishments (i.e., the *fetva*s concerning crimes that incurred discretionary punishment) under the section of fixed crimes correlates with the typical categorizations in Islamic law manuals, as in al-Halabi's *Multaqa al-abhur*, the most frequently used Hanafi manual in the Ottoman Empire. İbrahim al-Halabi, *Multaka'l-Abhur* (*Mülteka Tercümesi Mevkufatı*) (Istanbul: Matbaa-i Amire, 1269/1853), 373–374. For the widespread usage of this manual in the Ottoman Empire, see Şükrü Selim Has, "The Use of Multaqa'l-Abhur in the Ottoman Madrasas and in Legal Scholarship," *Osmanlı Araştırmaları* 7–8 (1988). For a detailed discussion of the category of discretionary punishment in Islamic law manuals and some earlier *fetva* collections, see Abdullah Özer, "İslam Hukuk Literatüründe Ta'zir Risaleleri ve Şeyhülislam Muhyiddin Mehmed b. İlyas Çivizade'nin Risale Müteallika bi't-Teazir Adlı Eseri" (MA thesis, Marmara Üniversitesi, 2000), 18–28.

121 This is especially true in the *Behcetü'l-Fetava* of Yenişehirli Ebü'l-Fazl, where the section on *ta'zir* on fixed crimes that incurred discretionary punishments is seven pages, while sections on crimes punishable by fixed penalty of the *shari'a* (e.g., theft, regular unlawful intercourse (*zina*), and regular false accusations of fornication [*kazf*]) include only a couple *fetva*s.

way, the predominance of sexual offenses for which the *fetva*s prescribed discretionary punishment was the reason the *ta'zir* section was specially located after the crimes concerning fornication. The extent of this section compared to the very limited number of *fetva*s concerning *zina* and its false accusation that incurred regular *shari'a* punishments shows that sexual offenses were considered the culmination of exceptions that did not fit into the category of the fixed penalty in *shari'a*.

We now turn to the specific circumstances in which sexual offenses needed "discretion"; what kinds of "discretionary punishments," different from the regular fixed penalties, were prescribed in these *fetva* collections. As for fornication, slander, rape, and other sexual assaults, the principle of *ta'zir* applied to the meting of discretionary punishments; unless all the elements of unlawful intercourse and false accusation of this could be found, the fixed penalty was dropped and replaced by a discretionary punishment. The most common crimes covered under *ta'zir* in three of the *fetva* collections were sodomy (including copulation with animals and anal intercourse with women), cursing that resembles the false accusation of *zina*, defamation with no reference to sex, slandering non-Muslims, and counterfeiting. It is worth noting that all kinds of sodomy incurred discretionary corporal punishments ranging from chastisement to the death penalty. For example, a man committing sodomy with a woman incurred severe chastisement with imprisonment.[122] Bestiality too incurred chastisement.[123] According Yenişehirli Abdullah, a man who was "habituated" to sodomy and committed this act with a young man (in the daytime during Ramadan) was given the death penalty.[124] We can observe that all of these crimes did not fulfill, for one reason or another the *shari'a* conditions such that they could be punishable by a fixed penalty.

Furthermore, most of the slander and cursing offenses were given "discretionary punishments" rather than the fixed penalty (eighty lashes) for *kazf* because the exact elements of a fixed crime according to the *shari'a* were not present. For a slander to be a fixed crime of *kazf*, the female victim must be a free "chaste" adult Muslim (*muhsana*)[125] and the slander must contain a direct

122 This same *fetva* of es-Seyyid Mustafa (Feyzullah Efendizade) on "anal intercourse with one's legal concubine" was quoted both in *Tuhfetü'l-Fetava* and *Neticetü'l-Fetava*. Dürrizade Mehmed, *Neticetü'l-Fetava maa'n-Nukul* 121; *Tuhfetü'l-Fetava*, Esad Efendi 589 (Süleymaniye Kütüphanesi), 26a.

123 Dürrizade Mehmed, *Neticetü'l-Fetava maa'n-Nukul*, 121; *Tuhfetü'l-Fetava,* Esad Efendi 589 (Süleymaniye Kütüphanesi), 26a.

124 Yenişehirli Ebü'l-Fazl, *Behcetü'l-Fetava ma'an-Nukul*, 152.

125 The word *muhsana* refers to a free adult Muslim woman who has no previous conviction of unlawful sexual intercourse.

accusation of *zina*. If the accused was a non-Muslim or a slander against her sexual honor took place, without a direct accusation of *zina*, the guilty party would incur a discretionary punishment since this did not fulfill the *shari'a* requirements for inflicting the fixed penalty. The following two *fetva*s represent cases that incurred such a discretionary punishment of chastisement. A Christian woman was involved in the former and the curse blames the person for being a procurer, not an adulterer, in the latter:

> If Christian Hind curses Christian Zeyneb as "Hey, adulterer!" what is required for Hind? *Answer:* Discretionary punishment (chastisement).[126]
>
> If Zeyd sues Amr for cursing him by saying [to him] "Hey, pimp!" and Amr denies the accusation, but a man and two women testify to Amr's cursing Zeyd, is Zeyd capable of making the judge inflict discretionary punishment on Amr? *Answer:* Yes, he is.[127]

The second important criterion for converting the penalty from a fixed to a discretionary punishment is the principle of doubt or uncertainty (*shubha*), that is, the unlawful act resembles a lawful one, as discussed in the previous chapter.[128] Yenişehirli Abdullah accepted "doubt" as a legitimate reason for using discretionary punishment in the case of sexual contact with the concubine of another person if the latter consented:

> Is it lawful if Amr has intercourse with Hind even though Zeyd who possesses her let Amr do so? *Answer*: No, it is not.
>
> Is the fixed penalty still required for Amr if he had intercourse with Hind, [if he] supposes that the act is lawful once the owner's consent is

126 "Hind-i nasraniye Zeyneb-i nasraniyeye bre zaniye deyu şetm eylese Hinde ne lazım olur? Elcevab: Ta'zir," Yenişehirli Ebü'l-Fazl, *Behcetü'l-Fetava ma'an-Nukul*, 148.

127 "Zeyd Amre sen bana bre deyyus deyü bi'l-muvacehe şetm eyledin deyü dava ve Amr inkar itdikde Zeyd'in müddeasına bir rical ve iki avret şehadet eyleseler, mukabele olub Zeyd Amr'i hakime ta'zir itdirmeğe kadir olur mu? El-cevab: Olur," Dürrizade Mehmed, *Neticetü'l-Fetava maa'n-Nukul*, 123. It should be noted that this *fetva* was attributed, by the initials at the end of the *fetva*, to "Mehmed Kamil." He was highly likely Seyyid Mehmed Kamil Efendi who served as *şeyhülislam* from 4 March 1788 to 19 August 1789. Although the instructions given at the beginning of the published compilation say that the collection includes *fetva*s of only nine chief muftis, we know that it includes *fetva*s of other chief muftis as well.

128 Judith Tucker, who studied the *fetva*s of local muftis in eighteenth-century Ottoman Syria and Palestine demonstrated that muftis accepted the claim of *shubha* in various rape cases in which they recommended the payment of compensation to the victim instead of the infliction of the *hadd* punishment. Tucker, *In the House of the Law*, 161.

> granted? *Answer*: No, it is not. Discretionary punishment (chastisement) is required.[129]

Intercourse with female slaves is one of the most prolific areas in Islamic law in which we find many examples of circumstances that can be put forward as a defense of uncertainty against a charge of unlawful intercourse.[130]

"Resemblance," similar to the principle of doubt, was another legal reason punishments were converted from fixed to discretionary punishment. Abduction, "marriage over marriage," and "marriage by force" were examples that "resembled" *zina* but did not fulfill the *shari'a* requirements. The chief muftis of the eighteenth century, especially Yenişehirli Abdullah, did not allow these cases to escape punishment and therefore listed them under the "discretionary punishment" section. As discussed extensively in the previous chapters, these were customary problems in Anatolia and people must have frequently applied to muftis with such questions in order for them to have given so many *fetva*s. Furthermore, the provinces experienced significant problems from bandits and the disturbance of public order, as eighteenth-century chief muftis certainly knew. This was evident from the fact that these cases can be found in detail in the *fetva*s, just as they were legislated under the "old Ottoman criminal code" as a crime, as explained earlier.

In Yenişehirli Abbullah's *Behcetü'l-Fetava* we find a couple of *fetva*s on unlawful marriages, all of which received discretionary punishments. For example, a man who "married" a woman, though aware that she had a husband in another town, was to be punished by severe chastisement (*ta'zir-i şedid*), just like one who lured and married a woman to another man.[131] It is interesting to note that neither of these *fetva*s mentions the question of whether the woman was to be punished or which penalty should be inflicted.[132] Although luring a woman is explicitly mentioned in the former and implied in the latter, it

129 "Zeyd malik olduğu cariyesi Hindin vatini Amre ihlal itmekle Amr dahi Hindi vati eylese helal olur mu? Elcevab: Olmaz. Bu suretde mücerred ihlal itmekle Hindi vati helal olur zan idüb vati itmiş olsa Amre hadd lazım olur mu? Elcevab: Olmaz. Ta'zir olunur." Yenişehirli Ebü'l-Fazl, *Behcetü'l-Fetava ma'an-Nukul*, 147.

130 Peters, *Crime and Punishment in Islamic Law*, 62.

131 Yenişehirli Ebü'l-Fazl, *Behcetü'l-Fetava ma'an-Nukul*, 148, 150.

132 There are many cases that, one way or another, came before the court of Ankara and Bursa in the eighteenth-century. However, I did not encounter any case in which a man was punished for marrying a woman when her husband was away. For a detailed discussion of such cases of the remarriage of deserted wives, see Tuğ, "Ottoman Women as Legal and Marital Subjects." Yet, there are many cases of abduction and "marrying over another marriage," as being discussed in Chapters 3 and 4.

appears that the chief mufti considered it a unilateral act since the woman was thought to have been led astray.

Marrying a woman by forcibly abducting her also found its way into the discretionary punishment section in the compilations of *fetva*s because it resembled rape:

> If Hind marries [herself] to Amr after both Zeyd and Amr wanted to marry her, and then Zeyd abducts her by breaking into her house by day and detains her by force in his residence for a couple of days to convince her to divorce Amr and marry himself, and Hind escapes without having intercourse with him, what is required for Zeyd? *Answer:* Severe chastisement (discretionary punishment) and imprisonment.[133]

It should be noted here that the *fetva* explicitly mentions "not having intercourse." This indicates that if there had been rape, the punishment would be either the fixed penalty, or a more severe discretionary punishment—most probably the death penalty or at least long imprisonment.

Finally, offenses concerning public order and morality incurred discretionary punishment in Yenişehirli's *fetva* such as the following:

> If the inhabitants of a town gather in a place on a special day of every year[134] and men wear their fine dresses and their women put on various ornaments as on the day of a religious festival, and all together eat food while women are unveiled [i.e., their bodies are unveiled] and sit, talk, and have fun with young and beardless men, and both parties look at each other without a good reason, what is required for them? *Answer:* They should be restrained and forbidden by way of severe chastisement.[135]

133 "Zeyd ve Amrden her biri Hindi tezevvüce talib olur Hind nefsini Amre vech-i şeri' üzere tezvic ittikden sonra Zeyd naharen Hindin menziline girip cebren menzilinden ihrac ve kendu menziline götürüb elbetde Amrden boşanub nefsini bana tezvic eyle deyu birkaç gün Hindi menzilinde alıkoyub beynlerinde fi'l-i fahiş vaki olmaksızın Hind Zeydin yeddinden halas olsa Zeyde ne lazım olur? Elcevab: Ta'zir-i şedid ve habs," Yenişehirli Ebü'l-Fazl, *Behcetü'l-Fetava ma'an-Nukul*, 150–151.

134 This is probably a reference to a *nawruz* celebration.

135 "Bir karyede sakin ehl-i İslam taifesinin ricali beher sene bir yevm-i mahsusda elbise-i nefiselerin giyüb ve dönenüb ve şabbelerin ve avradların envai ziynetle yevm-i 'iddeki gibi tezyin idüb karye kurbunda bir mevzi'-i ma'inede cümlesi maan cem olub cümle nisa mekşufetü'l-vücud oldukları halde şabb ve emred yiğitler ile maan oturub mukâleme ve mizah idüb tarafeynden birbirine bila mesug-i şer'i nazar idüb ve tehiye itdükleri at'imeyi muhtelitan oturub akil itmek adet eyleseler mezburlara ne lazım olur? Elcevab: Ta'zir-i şedid ile zecr ve men olunur," Yenişehirli Ebü'l-Fazl, *Behcetü'l-Fetava ma'an-Nukul*, 148.

Hence, the *fetva* collections of the eighteenth century reveal that most sexual offenses were categorized as crimes punishable by the "discretion" of the judicial authority even if they could not be defined according to *shari'a* principles. The existence of an extensive *ta'zir* section (as an appendix) in the *fetva* collections to explain mainly sexual offenses that do not fulfill the requirements of the *shari'a* demonstrates that of all the crimes concerning public order, illicit sex was considered and justified by the chief muftis as most in need of the "discretion" of the judicial authorities. We have seen the Ottoman state extended its discretion over sexual order through the effective deployment of the principle of *ta'zir* in penal codes. *Fetva* collections confirm that the discretion of the political authority (*veliyyü'l-emr*) was acknowledged and affirmed by chief muftis like Yenişehirli Abdullah as discussed in Chapter 1, and that sexual order was mainly entrusted to the discretion of the political authority until the eighteenth century. Now, we see how this legitimate sphere of "discretion" was utilized in favor of a more centrally and strictly controlled scrutiny of the penalties inflicted for the disturbance of public and moral order in the eighteenth century.

There is No Punishment but Ta'zir

This final section addresses the question of if and how the endeavor to grant "discretion" to the political power in the normative and practical legislation for sexual crimes was exercised in the enforcement of punishments for violations of sexual order in the eighteenth century. As indicated, it is difficult to track down which penalties were meted out and especially who executed the penalty given by the court's verdict. Despite the fact that this enigma, which mainly arises from the division of labor between the *kadı*s and administrative authorities (*ehl-i örf*), remained and created great obstacles. This study attempts to trace, to the extent possible, what punishments were imposed for sexual offenses by examining the interchanges in the court records and imperial orders in the eighteenth century. Such an analysis provides us with a larger picture of the penal regulation of sexual order in the more strictly scrutinized administrative practices of the Ottoman state in the eighteenth century.

The main objective of this section is to explore the fact that almost all of the penalties imposed for sexual offenses were, in fact, discretionary punishments, with only one exception (of *kazf*). Yet, I also demonstrate, as far as possible, who had the authority to give the sentence and/or carry out punishments for different penalties. Such an endeavor aims to demonstrate that the *kadı*'s jurisdiction was limited and in the eighteenth century punishments were administered under the close scrutiny and discretion of the political authorities.

1 Milder Discretionary Punishments

The first and most frequently applied punishment in Ottoman lands was flogging. It was the most common form of corporal punishment in the eighteenth century.[136] While the law books of earlier centuries and various contemporary observers mention other forms of corporal punishments, Ottoman archival documentation points to flogging, the bastinado, and capital punishment as the most commonly applied corporal punishments.[137] It is known that in the Ottoman Empire flogging was applied mainly in the form of the bastinado.[138] It is worth noting that the flogging applied to sexual offenders in Ottoman penal practice was generally the *ta'zir* punishment, since the lashes prescribed for *zina* offenders (by *shari'a* definitions) were converted to fines in the Ottoman *kanun*.[139] When chief muftis referred to *ta'zir* in their *fetva*s in the eighteenth century and prescribed discretionary punishment for most sexual offenses, it was the penalty of flogging they meant. Furthermore, Süleyman's law book used the term *ta'zir* to refer to a *kadı's* infliction of flogging on the spot.[140] We can infer that *ta'zir* most often meant corporal punishment when used in the court records based on the fact that its implementation on a pregnant female procurer was deferred in order not to harm the baby.[141]

The punishment of flogging was frequently inflicted on those who committed sexual offenses, ranging from breaking into a house, slandering, procuring, and pederasty to minor bodily harm.[142] For example, a certain Mustafa was sentenced to be flogged as the result of an allegation by the neighbors for entering the house of Alime with whom he was "in love."[143] Ayşe and Hadice, two sisters, who "did not refrain from allowing men into their house" and

136 Zarinebaf, *Crime and Punishment in Istanbul*, 160.

137 For such examples and a more detailed discussion on corporal punishments in the early-modern period, see Zarinebaf, *Crime and Punishment in Istanbul*, 157–160.

138 Evliya Çelebi, the famous Ottoman traveler of the seventeenth century, quotes an exception and mentions that criminals were punished by the scourge and lash in Istanbul. See, Evliya Çelebi, *Seyahatname* (Dersaadet, Istanbul: İkdam Matbaası, 1896), 1:121, as quoted in Heyd, *Studies in Old Ottoman Criminal Law*, 273, n. 3.

139 See Chapter 4.

140 Article 21 in Heyd, *Studies in Old Ottoman Criminal Law*, 61, 100.

141 See case 43–44 in Konya Court Records from 1716–17, transcribed into modern Turkish in İzzet Sak, *47 Numaralı Konya Şer'iye Sicili* (*1128–1129/1716–171*) *Transkripsiyon ve Dizin* (Konya: Tablet Kitabevi, 2006), 125–126.

142 For examples of such cases, see Konya Court Records 47, cases 106–4, 118–2, 127–2, 128–2, 197–4, 199–1, 212–4, 220–4, 228–2, in ibid., 284, 301, 303, 452, 455, 486, 504, 522–523 respectively.

143 Konya Court Records 47, case 106–4, ibid., 261.

whose neighbors gave testimony of their "mischief," were also sentenced to flogging.[144] Those men who were habituated to "entering others' houses" were also sentenced to flogging.[145]

Istanbul court records from the eighteenth century reveal additional information about *ta'zir* punishments in general. As explained, Istanbul court records were unique in the sense that they contained the *kadı*'s judgments reported to the Imperial Council. Cases from various courts in Istanbul between 1764 and 1766 reveal that "discretion by *shari'a*" (*ta'zir*) and other forms of discretionary punishments were frequently applied for sexual offenses in Istanbul.[146] For example, in the court of Eyüp, a sodomy case (with a young boy) was punished by severe flogging (*ta'zir-i şedid*).[147] Breaking into a house, attacking, and beating women in their houses, "violating someone's honor" (*hetk-i ırz*) by cursing with indecent words, and the "intermingling of men and women in a place with the intention to commit fornication" were all punished by "discretion by *shari'a*," which most of the time meant flogging imposed by the *kadı*. Other discretionary punishments such as banishment (for prostitution and procuring) or penal servitude in the galleys (*kürek*) (for vagabonds and non-Muslims who ill-treated Muslims) were explicitly mentioned and differentiated from the former, therefore we can deduce that they were imposed with the approval of the Imperial Council.[148] Zarinebaf gives an example from the court of Üsküdar in July 1721, in which the a male offender of sodomy was sentenced to severe chastisement (flogging) as well as long imprisonment and forced labor in the galleys in the imperial arsenal.[149] In those cases, the *kadı* seems to have informed the Imperial Council after inflicting the punishment of severe chastisement on the spot.

144 Konya Court Records 47, case 118–2, ibid., 284.

145 Konya Court Records 47, case 228–2, ibid., 522.

146 Yaşar Tekin, "Şer'iyye Sicilleri Işığında Osmanlı Devleti'nde Ta'zir Suç ve Cezaları" (MA thesis, Marmara Üniversitesi, 1995), 54–61.

147 Ibid., 96–97. This example contradicts Zarinebaf's argument that banishment and hard labor in the galleys replaced fines and flogging for sodomy in the early eighteenth century. See, Zarinebaf, *Crime and Punishment in Istanbul*, 116. While I agree that there was a gradual move from corporal punishments to corrective punishments such as imprisonment and banishment in the Ottoman penal system in the eighteenth century, it is still difficult to make generalizations given the scarcity of studies on the workings of Ottoman penal system in the early-modern period. For Zarinebaf's observation on the changes that took place in the Ottoman penal system in the eighteenth century, see ibid., 173–181.

148 Tekin, "Şer'iyye Sicilleri Işığında Osmanlı Devleti'nde Ta'zir Suç ve Cezaları," 74–105.

149 Zarinebaf, *Crime and Punishment in Istanbul*, 117.

These cases give us two important pieces of information concerning flogging in particular and *ta'zir* punishment in general. The first element we note is that flogging was left to the *kadı*'s discretion and carried out by the *kadı* as *ta'zir*, and this was an accepted *shari'a* punishment.[150] As we have seen in the Istanbul case, court records made a distinction between the *kadı*'s discretion and sultanic/administrative discretion by using the term "discretion by *shari'a*" (*şer'an ta'zir*) to refer to the former.[151] Yet, despite the fact that the *kadı* had the independent authority to inflict flogging (i.e., he did not need approval from a higher authority), his jurisdiction was still limited. Administrative officials (fief-holders), religious dignitaries, and *waqf* officials were exempt from flogging; if they committed a crime, the *kadı* needed to deliver them to the higher authorities.[152] In this sense, the *kadı*'s jurisdiction over the sentence of flogging was restricted to taxpaying Ottoman subjects, i.e., the common people.

The expression "severe flogging" (*ta'zir-i şedid*) used in the above-mentioned sodomy case in Eyüp hints at the second important point about discretionary punishments. Various criminals convicted of crimes ranging from simple verbal abuse to serious bodily harm or sexual assault, received the punishment of flogging by the *kadı*'s judgment; this indicates that the severity of the chastisement varied according to the *kadı*'s discretion. This is also implied by the fact that chief muftis in their *fetva*s permitted more severe flogging (meaning, to exceed the maximum number allowed by the *shari'a*) by prescribing *ta'zir-i şedid* for more serious offenses, such as abduction and "gathering of the opposite sexes for entertainment" as we have seen in the previous section. However, *kadı*s did not mention how many strokes were to be inflicted on the culprit. The number of strokes depended on the *kadı*'s discretion, based not only on the severity of the crime but also on his assessment of the status and personal situation of the offender.[153]

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150 Heyd, *Studies in Old Ottoman Criminal Law*, 271–272.

151 For examples of court cases in which "discretion by *shari'a*" was imposed in different courts, see Sak, *47 Numaralı Konya Şer'iye Sicili*, 261; Sadık Fethi Çetin, "466 Numaralı Üsküdar Şeriye Sicili (1178–1179/1764–1765)" (MA thesis, Marmara Üniversitesi, 1997), 203; Tekin, "Şer'iyye Sicilleri Işığında Osmanlı Devleti'nde Ta'zir Suç ve Cezaları," 54–61.

152 Heyd, *Studies in Old Ottoman Criminal Law*, 274–275. Manuscripts on *siyasa shari'a* (such as that of al-Mawardi) and *ta'zir* (such as the *Risale Mütallika bi't-Teazir* of Çivizade) attribute a special status to higher classes with regard to their treatment by judicial authorities. See al-Mawardi, *al-Ahkam as-Sultaniyyah*; Özer, "İslam Hukuk Literatüründe."

153 The number of strokes and the degree of discretionary punishments in general were a matter of discussion. Throughout Islamic history jurists tried to set limits on the wide discretionary powers of *kadı*s and officials, whereas the discretion of politico-judicial powers generally exceeded these limits. According to Abu Yusuf, the Hanafi jurist, the

This was actually a general rule that differentiated discretionary punishments from fixed (*hadd*) penalties. The most important characteristic of discretionary punishment was that the status and personality of the offender were important decisive factors in selecting the appropriate punishment and its degree of severity, whereas the fixed penalty (*hadd*) was literally fixed, it could not be changed in accordance with the conditions.[154] Deferral of the pregnant woman's punishment in the first case given is a good example of the mutability of discretionary punishment. The mutability was what differentiated *ta'zir* flogging from the "fixed penalty" of flogging prescribed by the *shari'a* for fornication and slander. While the severity (the number of strokes) of the former was left to the "discretion" of the judicial and executive authorities, the latter was fixed. For example, in litigation brought to the Ankara court by a girl named Zeynep, against someone named Mahmud, who broke into her house and later slandered her by saying she had had sexual intercourse with him, the judge gave a verdict inflicting the fixed penalty of false accusation of fornication (explicitly *hadd-i kazf*)[155] to be executed by a constable (*zabit*).[156] The latter case constitutes an exception to the generalization that in the eighteenth century the penalties inflicted for sexual offenses were all discretionary. The judge gave this exceptional verdict only after Zeynep's virginity was examined by midwives and the mufti of Ankara, Hafız Mehmed Efendi, was asked for a legal opinion about the penalty that was to be imposed. Thus, the verdict he gave for the punishment was not a fully autonomous one; rather it relied on the legal opinion of the local mufti.[157] It would seem that the *kadı* reinforced the verdict through the authority of the mufti when delivering sentences for *shari'a*-based punishments. More importantly, he did not have authority to

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maximum number of strokes for drinking alcohol was seventy-nine, and according to some Hanbali and Shafi'i jurists for sexual offenses it was ninety-nine. The principle in these designations was to not exceed the amount prescribed for *hadd* crimes, in which the maximum number of strokes for *zina* was one hundred. However, in Ottoman cases, some punishments quoted in sixteenth-century Bursa court records reached two hundred strokes, while European travelers noted a higher number, up to five hundred strokes. Heyd, *Studies in Old Ottoman Criminal Law*, 273–274.

154 Peters, *Crime and Punishment in Islamic Law*, 66.

155 This would be eighty lashes according to the *shari'a*, though this was not mentioned in the record. However, Heyd mentions that even one hundred strokes might be inflicted in Ottoman legal practice. Heyd, *Studies in Old Ottoman Criminal Law*, 272, n. 6.

156 ACR, A122, 94 (20 Ramazan 1156/7 November 1743).

157 As explained, Ginio argues that if a *kadı* in eighteenth-century Salonica gave a judgment involving punishment, he often relied on the authority of outsiders, either the governor or the local mufti. See Ginio, "The Administration of Criminal Justice," 192–193.

decide about the severity of the flogging, in contrast to his discretion in *ta'zir* flogging.

Finally, with regard to the question of who executed the penalty of flogging, we have limited clues in the court records. In the previous sodomy case the judge gave an order for the constable (*zabit*), the executive authority, to inflict the penalty of flogging. In another case, we see that the culprit was delivered by the *kadı*'s judicial notification (*hüccet*) to the police superintendent (*subaşı*) of the town to be flogged but the companions of the culprit raided the officer's room and wounded one of his attendants when they were about to carry out the penalty.[158] In fact, Zarinebaf confirms that in eighteenth-century Istanbul the *subaşı*, the police superintendent or the chief of day police, had considerable authority, worked under the authority of the *kadı*, and administered the bastinado and flogging to the artisans and merchants who violated guild rules.[159] Heyd mentions that floggings were generally administered immediately on the spot, i.e., in the presence of the *kadı*, after the person was found guilty.[160] In conclusion, we can see that, in the eighteenth century, flogging as a relatively mild, simple, and immediately-imposed corporal punishment was one of the rare discretionary punishments, the jurisdiction of which was left almost totally to the *kadı*'s discretion.

The judge had authority to sentence sexual offenders to punishments other than flogging. The second most frequently applied discretionary punishment for sexual crimes which fell under the almost absolute discretion of the *kadı* was expulsion (*huruc*) from the neighborhood or village. This punishment was often imposed on those who acted against public morality. Men and women who were notorious for prostitution and procuring were convicted based on neighbors' allegations and sentenced to expulsion from their quarter or village to another one. (See Figure 5.1) Such local expulsions, i.e., banishment from the neighborhood or village, were often administered by the *kadı* while larger, more regional expulsions, i.e., banishment from a city, seemed to have been authorized by the Imperial Council.

For example, Mehmed Hüseyin and Şerife Ayşe, a couple from Ankara, were expelled from their neighborhood after the *kadı* convicted Mehmed Hüseyin of having procured his wife for the use of villainous men in their own house.[161] Similarly, a father and his son who attacked and cursed their neighbors in

158 Konya Court Records 47, case 104–2 in Sak, *47 Numaralı Konya Şer'iye Sicili*, 255–256.

159 Zarinebaf, *Crime and Punishment in Istanbul*, 136.

160 Heyd, *Studies in Old Ottoman Criminal Law*, 272.

161 ACR, 121, 86 (23 Zilhicce 1154/28 February-1 March 1742).

FIGURE 5.1 *A raid on a brothel.* Hûbânnâme ve Zenânnâme (*c. 1793*), Fazıl Enderûnî Hüseyin. ISTANBUL UNIVERSITY LIBRARY, T 5502, FOLIO 148.

Ankara,[162] a man and his daughter whose "house was a place of mischief and alcohol consumption,"[163] a woman who ran away with "bandits" in Bursa,[164] and another woman who repeatedly committed promiscuous acts and who had previously been banned from her neighborhood in Ankara,[165] were all expelled from their neighborhoods or villages through the sentence of the *kadı*.

It appears that expulsion was a powerful form of punishment in early-modern Ottoman societies. However, the communities had a variety of customary practices for dealing with those who acted against public mores. For example, a preliminary comparison of Ankara and Bursa courts records with the Konya records for approximately the same period indicates that the *kadı*s of Ankara and Bursa mostly preferred to expel those who did not fit into the moral norms of the society, whereas the *kadı* of Konya kept people in the community but inflicted the corporal punishment of flogging.[166] In Ottoman Aleppo, expulsion from the quarter seems to have been the most common form of punishment for cases of sexual indiscretion.[167] This also points to the fact that "discretionary punishment" opened up an opportunity for judicial authorities to establish sexual order in varying means and degrees.

The severity of the punishment, especially against prostitution and procuring, also depended on the frequency of the crime, i.e., the extent of the concentration of prostitution and governmental policies on the vice trade. There were periodic anti-prostitution governmental campaigns throughout the empire—as the sartorial regulations explained in Chapter 1—but these did not become systematic until the late nineteenth century.[168] For example, while

162 ACR, 121, 214 (22 Rebiülahir 1155/25–26 June 1742).

163 ACR, 124, 91 (1159/1746).

164 BCR, B121, 110 (14 Rebiülevvel 1156/8 May 1743). This case is discussed in Chapter 3 in more detail. She was expelled from her "village" since this case comes from not the city center, but a village of Bursa.

165 ACR, 121, 37 (5 Şevval 1154/13–14 December 1741).

166 See previous examples from the Konya court records in nn. 142, 143, 144, 145.

167 Semerdjian, *"Off the Straight Path,"* 99–137. Marcus, *The Middle East on the Eve of Modernity*, 118, 314.

168 See Semerdjian, *"Off the Straight Path,"* 109–111. Rafeq, "Public Morality in 18th Century Ottoman Damascus"; Zilfi, *Women and Slavery*, 199–206. Khaled Fahmy, "Prostitution in Egypt in the Nineteenth Century," in *Outside In: On the Margins of the Modem Middle East*, ed. Eugene Rogan (London: I.B. Tauris, 2002). James E. Baldwin, "Prostitution, Islamic Law and Ottoman Societies," *Journal of the Economic and Social History of the Orient* 55 (2012); Zarinebaf, *Crime and Punishment in Istanbul*; Marinos Sariyannis, "Prostitution in Ottoman Istanbul, Late Sixteenth-Early Eighteenth Century," *Turcica* 40 (2008). Expulsion continued to be a common form of punishment for undesirable women and their families

governor Asad Pasha al-'Azm in Damascus issued certain bans, especially in 1747–49, against prostitutes by strolling the streets and gathering them in the marketplace, they did not become long lasting and effective.[169] Prostitution is a social institution that a majority of male-dominated societies benefit from. In the early-modern Ottoman context, prostitution provided sexual, social, and material benefits to cavalry soldiers, slave dealers who trafficked in women, and government officials who taxed or procured prostitution in cities like Aleppo, Cairo, and Istanbul.[170] Moreover, prostitution tended to intensify in times of poverty and migration, as in the eighteenth-century Ottoman Empire, when lower class women practiced the profession, either voluntarily, by necessity, or by force.[171] Considering these factors, in the early-modern period the surveillance of procurers and prostitutes depended more on the communal watch than governmental policies.[172] Thus, the breaches of social harmony in

in the late eighteenth century. See, Başaran, *Selim III, Social Control and Policing in Istanbul*, 190–200.

169 Rafeq, "Public Morality in 18th Century Ottoman Damascus," 183.

170 For the close connection of *levend*s, prostitutes, and the taxation of prostitution by governors in Ottoman Aleppo, see Semerdjian, *"Off the Straight Path,"* 94–137. Government officials and soldiers were often patrons of prostitutes in Ottoman Aleppo. Semerdjian, "Sinful Professions: Illegal Occupations of Women in Ottoman Aleppo, Syria," *Hawwa* 1, no. 1 (2003), 64. Zilfi gives many examples from Istanbul in which licensed and unlicensed slave dealers acted as traffickers in women for unlawful purposes. She also calls our attention to the whisper-thin line "between prostitution and the selling of a female slave to another male, who might sell her to yet another." Zilfi, *Women and Slavery*, 199–205. Baldwin uses contemporary chronicles from the eighteenth century to show that tolerance of prostitution was institutionalized through taxation in eighteenth-century Cairo. Baldwin, "Prostitution, Islamic Law and Ottoman Societies," 142–146. For taxation of prostitution in other cities as well, also see Sariyannis, "Prostitution in Ottoman Istanbul," 55–57.

171 Zarinebaf claims that there was an increase in prostitution due to commercial sex and economic difficulties in eighteenth-century Istanbul and that "many of these prostitutes and streetwalkers were rural migrants who lived by themselves or with other women and engaged in commercial sex to earn a living" in eighteenth-century Istanbul. See, Zarinebaf, *Crime and Punishment in Istanbul* 87, 91. Yet Zarinebaf's study and other studies mentioned above also document activities of prostitution and procurement from different strata and fields of society. For example, there were many prostitutes and procurers involved in such activities in their own houses, as documented in Ankara and Bursa court records. Also see, Sariyannis, "Prostitution in Ottoman Istanbul." Furthermore, Başaran's study on late eighteenth-century Istanbul does not substantiate an increase in prostitution, in contrast to Zarinebaf's argument in favor of an increase. Başaran, *Selim III, Social Control and Policing in Istanbul*, 198.

172 This seems to be the case for other early-modern societies. Judith R. Walkowitz argues that the British Contagious Disease Acts of the government in the second half of the nineteenth century changed the social profile of sex workers by stigmatizing these women and

neighborhoods were brought to the attention of the courts with the aim of re-establishing the order rather than correcting or punishing the offender's behavior. In this context, the community asked for the expulsion of prostitutes, procurers, and undesirable neighbors in an effort to restore social harmony.[173] Governmental policies were in fact in harmony with communal decisions to expel prostitutes and procurers from city centers and thereby clean up the city's public space as a form of "conciliatory resolution."[174]

The court records do not reveal who enforced or followed up the matter. Neighbors seemed to take an active part in scrutinizing the rest of the process just as they initiated the litigation. For example, the inhabitants of the Hacı Murad neighborhood in Ankara sued a woman a second time for insisting on returning to the neighborhood despite the fact that she had been forced to leave under a previous court sentence.[175] In cases where the *kadı* decided on the expulsion of a certain person (from her neighborhood), the record generally ended with an expression that "a warning for her expulsion to another neighborhood" was given ("mahalleden hurucuna ba'de't-tenbih").[176] *Tenbih* actually meant warning and ordering. In the examples of expulsion, it is not clear which one is implied, nor is it clear how the *kadı* imposed sanctions for expulsion. In other words, we cannot know if the *kadı* simply "warned" the culprit to leave the neighborhood or notified and "commanded" an executive authority to monitor the culprit until she left the neighborhood.[177] In some cases in which the *kadı* sentenced the culprits to flogging and imprisonment, we see that the *kadı* "commanded" an administrative authority to inflict the

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potentially making all women (but especially the working poor) vulnerable to charges of prostitution. In other words, she claims that "prostitution" as an institution was a product of disciplinary state regulations over the poor and the female body in nineteenth-century England. Walkowitz, *Prostitution and Victorian Society*.

173 Baldwin makes a similar observation on the function of expulsion in cases of prostitution. Baldwin, "Prostitution, Islamic Law and Ottoman Societies," 136–141. Also see, Başaran, *Selim III, Social Control and Policing in Istanbul*, 198–199.

174 Shirine Hamadeh, "Mean Streets: Space and Moral Order in Early Modern Istanbul," *Turcica* 44 (2012–13), 266–270.

175 ACR, 121, 37 (5 Şevval 1154/13–14 December 1741).

176 For an example of such usage, see ACR, 124, 91 (1159/1746).

177 Ginio, who discusses whether *tenbih* was merely a warning or included punitive sanctions, explains that "the only evidence relating to a *kadı*'s warning that was followed by a specific sanction to be implemented" was the verdict for expulsion of prostitutes from their neighborhoods. He also mentions that he found only one case indicating that the culprit actually left the neighborhood. In this case, a woman who was sentenced to expulsion and ordered to leave her residence transferred her property rights in the neighborhood to her brother. Ginio, "The Administration of Criminal Justice," 197, n. 41.

penalty. For example, in a theft offense in which the culprit was sentenced to imprisonment by the court of Ankara, there is a direct indication that the *kadı* delivered a *tenbih* to es-Seyyid Mehmed Efendi for the imprisonment of the culprit who was also a *seyyid* (descendent of the Prophet).[178] Furthermore, as we have seen earlier, court records sometimes specifically indicate the name of the person (often a *zabit*) to whom the culprit was handed over with a "command for her chastisement" (*ta'zirine tenbih*).[179] Finally, Başaran indicates that in late eighteenth-century Istanbul "judges seem to have played the role of intermediary in reaching settlements that were validated by the Imperial Council," and that the parties involved determined the terms of the banishment, such as the number of days before departure. If there was no settlement between the parties, the judge requested that the Imperial Council issue a decree for expulsion.[180]

Consequently, discretionary punishments of flogging and expulsion inflicted for sexual offenses can be traced through the court records with relative ease since the *kadı* was able to give a definite sentence without approval of the judgment from a higher authority. Attention to the types of sexual offenses also gives an idea about the independent judgment of the *kadı*. Among the sexual offenses we have seen so far, there were no grave offenses such as rape or any other serious sexual assault, rather these were milder sexual offenses with no major physical damage to the victim or the community—with only one exception from the Eyüp (Istanbul) court of a sodomy case in which the guilty party was sentenced to "severe chastisement." However, it becomes more difficult to track down punishments in the court sentences for graver sexual offenses since the *kadı*s needed the approval of a higher authority, most often that of the Imperial Council, to inflict punishment for many of the serious sexual offenses, as I explain in the following part of my discussion.

II Severe Punishments under the Discretion of the Political Power

By the eighteenth century, Ottoman authorities seem to have established a more effective penal scrutiny of crime by regularly registering grave crimes and

178 ACR, 121, 230 (Cemaziye'l-evvel 1155/August 1742). In the eighteenth century, the group of *sadat* (pl. *seyyid*) increased extensively when many local notables and ordinary taxpaying subjects acquired this status; Canbakal calls this a process of "seyyidization." The penalty imposed on a member of the *sadat* was supposed to be executed by their leader, *nakibü'l-eşraf*, because of their special status. See Canbakal, "Ayntab at the End of the Seventeenth-Century," 154–196.

179 Konya Court Records 47, cases 10–5, 50–4 and 127–2, in Sak, *47 Numaralı Konya Şer'iye Sicili*, 139, 301.

180 Başaran, *Selim III, Social Control and Policing in Istanbul*, 200.

serious criminals in registers for banishment and confinement. These forms of discretionary punishments were often inflicted for the grave sexual offenses of abduction, rape, and serial sexual assault. Furthermore, by the eighteenth century, the imperial center paid special attention to such grave crimes, and no longer delegated "discretion" to local authorities to punish them. Neither the local administrators nor the *kadı*s seem to have had the authority to inflict these punishments without the approval of the imperial government. Although notifying Istanbul was, on the one hand, an intrinsic necessity for making arrangements for the culprits' transfer to other cities and islands in the empire, on the other hand, their inability or unwillingness to find more local solutions of punishing the criminals (such as improving local infrastructure by building prisons in the provinces), implies that the government consciously sought to establish a more centripetal scrutiny over public and sexual order in the eighteenth century. The proliferation of record keeping in the imperial center and the systematization of recording the imperial decrees in the local court records seems to have been designed to make such a centripetal system possible and work more effectively. It would seem that the Ottoman authorities did not want "outlaws" to remain within their locality, given the problems inherent in what had presumably become a "well-organized" provincial network of outlaws and administrators in the eighteenth century.

A notification written by a military official (*cebeci*, armorer) from Kayseri to the Imperial Council requesting approval for the imprisonment of a rape offender reveals the fact that severe punishments for serious sexual crimes had to be approved by the central administration in Istanbul.[181] In this example, the military official submitted a notification to the Imperial Council, saying that he had arrested and temporarily imprisoned Ahmed who had deflowered Fatma Şerife, and had handed him over to the local court for interrogation. He asked for the approval of the Imperial Council to imprison him permanently if Ahmed were convicted of rape by the local *kadı*.

The most frequently inflicted penalties for grave sexual offenses were various forms of confinement/imprisonment (*habs*) and its variants in the form of confinement in a fortress (*kal'abend*) or on an island (*cezirebend*), and banishment (*nefy*) to another city. Banishment to another city, generally far from the one s/he resided must be distinguished from expulsion (*huruc*) from her/his neighborhood with regard to both the severity of the punishment and the management of its infliction. It is not easy to qualify the severity of these two crimes given that both were prostitutes; one was expelled from her neighborhood and the other was banished from the city, but it is clear that managing

181 BOA, Cevdet Adliye, 757 (Cemaziye'l-evvel 1183/9–10 September 1769).

the movement of the convicted person from one city to another was much more complicated and burdensome for both the guilty party and the enforcing agents.

Although imprisonment (*habs*) was rarely prescribed (for rape) in the old criminal law of the sixteenth century, it required the approval of the Imperial Council even if the *kadı* gave a sentence. Yet, it was frequently mentioned (for sodomy and abduction)[182] in the Ottoman *fetva*s of the eighteenth century. Imperial Council registers and correspondence of the administrative authorities, including the *kadı*, with the Imperial Council give plenty of information about imprisonment and other forms of confinement, whereas in the eighteenth-century court records of Ankara and Bursa there is no sexual offense case that ended with an explicit *kadı* sentence of imprisonment for a sexual offender. This in itself substantiates the fact that in eighteenth-century Anatolia the *kadı* and the local administrators had little independent judicial authority to impose more serious punishments.

In the eighteenth century imperial orders registered in the Ankara and Bursa court records, in the *Ahkam* registers, and, most importantly, in the *kal'abend* registers give us invaluable information on sexual offenses and other crimes that were punished by confinement to a fortress, to an island, and banishment. We must emphasize that the very fact that the Imperial Council kept special *kal'abend* registers from 1722 to 1841 in order to record the penalties of confinement and banishment clearly shows that by the eighteenth century the central government was consciously attempting to scrutinize the penal administration for serious crimes and hardened criminals more closely.[183] Finally, petitions of Ottoman subjects submitted to the Imperial Council requesting the imprisonment of the accused in a fortress give us an idea about the popularity of the punishment in the eighteenth century.

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182 Heyd, *Studies in Old Ottoman Criminal Law*, 301. Metin Hülagü, "İslam Hukukunda Kişinin Hapsi" (MA thesis, Marmara Üniversitesi, 1987). Also see Chapter 4 for examples of the criminal codes of the sixteenth century and the current chapter for the *fetva*s of the eighteenth century.

183 Although my research on these registers was preliminary, it gave me an idea about the workings of this institution in the eighteenth-century Ottoman Empire. Neşe Erim's work on an exceptional volume of *kal'abend* was very helpful to obtaining a general idea about crimes and punishments in these registers. The volume that Erim worked on was distinct, as it only contained cases that were not pardoned after Ahmed III's accession from 1703 until 1711. In this sense, it contains only indictable offenses that were beyond the pardon of the sultan. Despite being exceptional, it still bears the characteristics of a typical *kal'abend* register. Neşe Erim, "Osmanlı İmparatorluğu'nda Kalebendlik Cezası ve Suçların Sınıflandırılması Üzerine Bir Deneme," *Osmanlı Araştırmaları*, no. 4 (1984).

According to the archival documents, legal imprisonment could take two forms in practice: While it most often took the form of custody while awaiting trial (especially for debt cases), this was also the final penalty inflicted on the culprit, but only through an imperial order. In the court records of the period, I have often found imprisonment as a form of temporary custody until the case was resolved or as an extra-legal torture and punishment mechanism without a court trial.[184] In one case, in which a man sold free women into slavery in Edirne, we find both forms of imprisonment. The men were first caught and imprisoned by the "commander of the imperial guards" (*bostancıbaşı*) and then their trial was held in the local court of Edirne. After the court substantiated their crime, the *kadı* sent a notification to Istanbul to obtain approval to imprison them as the final sentence.[185] Since Edirne had its own fortress used for confinement purposes as well, it is most probable that the convict was going to be imprisoned there since the document does not mention his transfer to another place, and this is generally seen when the culprit was going to be transferred to a distant fortress.[186] In Salonica, most prisoners were confined in the local citadels under the supervision of the warden of the citadel (*dizdar*) though the *kadı* still needed an order from the sultan.[187] Our example also shows that the imprisonment as a final penalty required imperial authorization even if the culprit was going to be imprisoned locally.

Although the culprits in the previous example seem to have been confined locally, in the eighteenth century offenders were generally sent to various fortresses (as *kal'abend*) or to islands (as *cezirebend*) or just banished to another city (*nefy*) in the empire. Those who were sent to fortresses or islands were generally allowed to live there as inhabitants of the city as long as they did not disturb law and order.[188] They were even allowed to bring their families with them

184 See the example of theft under the discussion of expulsion and banishment. For a discussion of a semi-legal form of imprisonment, see Chapters 2 and 3. For other extra- and semi-legal applications of imprisonment as an investigation or torture method and debt recovery in seventeenth-century Bursa court records, see Abacı, *Bursa Şehri'nde Osmanlı Hukuku'nun Uygulanması*, 129–131.

185 BOA, Cevdet Adliye, 4014 (25 Cemaziye'l-ahir 1142/14–15 January 1730).

186 An interesting petition was submitted by a *timar*-holder from Kastamonu who complained that a usurper seized the surplus from his fief as well as the property of his deceased sister-in-law. Since the usurper cooperated with the judge and the *timar*-holder could not hold out against him, he requested that the Imperial Council imprison the usurper in the fortress of Sinop. BOA, A.DVN.ŞKT 67, petition 94 (1157/1744–45).

187 Ginio, "The Administration of Criminal Justice," 195.

188 There were some "fortress cities" that may not have had many local inhabitants. It is not clear if those convicted and sent there slept in a fortress itself or lived in their own

or to marry local women.[189] For example, many of those "undesirables" who were banished to Cyprus in the late sixteenth century simply settled into villages and towns. "Walled fortresses like Magosa or Girniye could hold even the most dangerous convicted criminals, but very few were confined there," said Jennings.[190] The most dangerous criminals, such as bandits, murderers, and serial rapists seemed to be kept under strict confinement within the fortress.

Female offenders who committed serious sexual crimes seem to have been mostly banished to another city or sent to an island (as *cezirebend*). Both penalties required the approval of the Imperial Council too. An imperial decree was sent to the judge of Bursa to force two prostitutes to be sent from Istanbul to reside in Bursa.[191] Bursa was an important center to which sexual offenders, among them prostitutes, procuresses, and other female offenders, occupied an important place; they were banished there from all over Anatolia.[192] *Kal'abend* registers also document the fact that prostitutes and some offenders of rape were banished to Bursa, Bozcaada, and Lemnos (Limni).[193] Başaran reports that during the late eighteenth century authorities exiled prostitutes most frequently to Bursa, Iznikmid, Mudanya, and Tekfurdağı.[194] In times of stricter moral control, the police in Istanbul raided prostitutes in the streets and in brothels, collected them, and sent them to Bursa for banishment.[195] Islands like Cyprus, Bozcaada, Lemnos, and Crete were particularly suitable for banishing convicts since they were isolated, less populated, and had mild climates.[196]

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houses. If so, relative to modern systems of imprisonment, this punishment was similar to banishment.

189 Mustafa Avcı, "Hukuk Tarihimizde Hapis Kurumu" (Diyarbakır: Diyarbakır Üniversitesi, 2000), 150.

190 Ronald C. Jennings, *Christians and Muslims in Ottoman Cyprus and the Mediterranean World, 1571–1640* (New York: New York University Press, 1993), 228.

191 BCR, B166, 17B-2 (Evail-i Rebiü'l-evvel 1155/May 1742).

192 For examples of the banishment of female procurers, prostitutes, and sexual offenders to Bursa from Istanbul during the eighteenth century, see Zarinebaf, *Crime and Punishment in Istanbul*, 87, 91, 99, 108, 115, 135, 172. this practice seems to have continued in the late eighteenth century. See, Başaran, *Selim III, Social Control and Policing in Istanbul*, 35, 99, 198.

193 Erim, "Osmanlı İmparatorluğu'nda Kalebendlik," 82, 87.

194 Başaran, *Selim III, Social Control and Policing in Istanbul*, 198.

195 Zarinebaf gives two interesting examples of such raids that took place in 1778 and 1791. In the first, the police collected eight prostitutes at once and banished them to Bursa in 1778. In the other raid, seven prostitutes were arrested for operating brothels in Kumkapı and sent to Bursa again. Zarinebaf, *Crime and Punishment in Istanbul*, 108.

196 Jennings, *Christians and Muslims*, 232–234.

However, this does not necessarily mean that the living conditions for convicts were easy. There are a number of petitions recorded in the *kal'abend* registers in which convicts or relatives writing on their behalf asked for their discharge from confinement because of the miserable conditions. While some managed to return to their homes, many remained under these conditions, and few managed to improve her living conditions. For example, in the early eighteenth century a certain Saliha from Kandiye, Crete, petitioned the governor to be allowed to move to a village after spending five months in Kissamos[197] where she had "become tired of wandering, of being hungry and of being despised."[198]

According to a unique volume of *kal'abend* registers that cover the period from 1703 to 1711 after Ahmed III's accession, sixty percent of those sentenced to banishment (*nefy*) had been convicted of the sexual offenses of prostitution or rape.[199] Yet, there were also female perpetrators of other crimes among those banished to islands and other cities. For example, a woman who slandered her neighbors by continuously accusing them of committing fornication with her was banished to Bursa.[200] The repeated character of her slander connoted the habitualness of the offense[201] was likely the reason she received this harsh punishment. Finally, though not a sexual offender herself, a woman from Bursa who assisted her son to break into someone else's house and steal their property was banished to the island of Bozcaada as a *cezirebend*.[202]

Male perpetrators of serious offenses were most often banished or confined in fortresses. Those convicted of serious abduction and rape offenses, those associated with "bandits" described earlier, were sent to fortresses. For example, two royal guards in Istanbul were arrested by their chief while they were abducting and wounding three women and were sentenced to confinement (*kal'abend*) in the fortress of Boğazköy.[203] The *kadı* of Konya reported to the Imperial Court the community's petition asking that the two "bandits" and a man be sent to the fortress in Magosa in Cyprus. These two bandits had

197 A deserted and mountainous district in the northwestern corner of the island.

198 Eugenia Kermeli, "Sin and the Sinner: Folles Femmes in Ottoman Crete," *Eurasian Studies* 1, no. 1 (2002), 94.

199 Erim, "Osmanlı İmparatorluğu'nda Kalebendlik," 87. Since Erim made only a quantitative analysis of crimes encountered in the register, it is not possible to draw conclusions on the distinctive characteristic of sexual crimes punished by banishment.

200 BOA, Kal'abend Defteri 8, p. 39, case 2 (Cemaziye'l-evvel 1156/July 1743).

201 See Chapter 3 for a discussion of the importance of the habitual character of the offense in terms of the increase in the punishment.

202 BCR, B166, 40B/1.

203 BOA, Kal'abend Defteri 8, p. 1, case 2 (Rebiü'l-evvel 1156/May 1743).

abducted the sister of the aforementioned man with his own assistance and did not hand her over to the man to whom she was in fact married.[204]

The most serious crimes against public order, such as "fomenting mischief" (*sa'i bi'l-fesad*), "inciting Ottoman subjects to riot," banditry,[205] counterfeiting, oppression, bribery, forcing people to convert,[206] and murder and bodily harm[207] were also punished by banishment to a fortress and most probably confinement in the fortress, as they were serious criminals.[208] Complaints or official notifications of the *kadı*s and administrative authorities about mischievous persons' "breaking into other's houses and assaulting their wife and daughters with the intention of rape" and thus "violating their honor" was a very common reason for sending culprits to fortresses. The *kadı* of Seydişehir notified the Imperial Council about the community's complaints against certain "outlaws" who violated people's honor by breaking into their houses and assaulting their wives and daughters and therefore the community requested their confinement in the fortress.[209] Another "bandit" was sent to the fortress of Samsun as a result of a letter from the Kastamonu judge notifying the Imperial Council about the community's complaints about this bandit, who was guilty of "violating their honor."[210] Finally, Ibrahim, who attempted to rape Saime by bringing her to his house by force, was sent back to the fortress after his initial release because he continued to assault women in his neighborhood in Istanbul.[211]

Penal servitude on the galleys (*kürek mahkumiyeti* or *kürek cezası*) was another discretionary punishment that was imposed for sexual offenses during the eighteenth century. Despite the fact that this specific penalty was known to neither the *shari'a* nor the *kanun,* it should be noted that it became very common from the sixteenth century onward, when the Ottoman navy needed

204 BOA, Cevdet Adliye, 3430 (9 R 1147/7–8 September 1734).

205 Bandits who disobeyed the law were sentenced to confinement (*kal'abend*) by imperial order. ACR, 124, 156.

206 Armenian priests in Ankara who converted to Catholicism were imprisoned in the fortresses of Ankara and Samsun. ACR, 124, 175.

207 One of the "converted" priests mentioned above assaulted a nun and killed her sister to force them to convert. ACR, 124, 153.

208 For the lists and tables of crimes encountered in the *kal'abend* register of 1703–11, see Erim, "Osmanlı İmparatorluğu'nda Kalebendlik."

209 "…menzillerine girüb cebren iyallerine fi'l-i şeni' ve bakire kızlarının bikrini izaleye kasd ve hetk-i ırz ve bunun emsali nice fesad ve şekavetinin nihayeti olmayub…," BOA, Kal'abend Defteri 8, p. 1, case 3 (Rebiü'l-evvel 1156/May 1743).

210 BOA, Kal'abend Defteri 8, p. 21, case 6 (Rebiü'l-ahir 1156/May-June 1743).

211 BOA, Kal'abend Defteri 8, p. 14, case 1 (Şaban 1156/September 1743).

oarsmen.[212] Needless to say this "discretionary punishment" was also under the purview of the central government and the military judges in the Imperial Council who were the judicial representative of *veliyyü'l-emr* (guardian of the command).[213] We have no documents in the Ankara and Bursa court records to indicate that the *kadı* independently sentenced the culprit to penal servitude in the galleys, that is, without asking for an imperial decree from the central government. For example, we have a notification (*i'lam*) sent by the *kadı* of Istanbul to the Imperial Council, in which he requests approval to sentence Salih to a *kürek* penalty after convicting him of raping "someone else's" little boy and two servants. In answer to his letter, the Imperial Council ordered Salih to be sent to İzmit for *kürek* punishment and this order was recorded at the top of the notification sent by the *kadı*.[214]

Kürek punishment was in fact a substitute that arose from the need for labor in the galleys; various degrees of discretionary punishments, from sentences for various offenses ranging from the gravest ones punishable by death (such as murder, apostasy and highway robbery), to more minor offenses like theft or denunciation, which were punishable by flogging and fines. The severity of the crime and the status of the convict seemed to determine the length of his servitude in the galleys, in parallel to the principles of meting out discretionary punishment in Islam. The length of the servitude also seems to have been related to the Ottoman navy's need for oarsman. Though in the sixteenth century the average time spent on galleys was eight years, the length of servitude in the galleys decreased; during the eighteenth century imprisonment and confinement in the fortresses gradually replaced *kürek*.[215]

According to the imperial "registers of the convicts sent to the imperial galleys" from the early eighteenth century, on which Zarinebaf undertook

212 Heyd, *Studies in Old Ottoman Criminal Law*, 304–305.

213 Mehmet İpşirli, "XVI. Asrın İkinci Yarısında Kürek Cezası ile İlgili Hükümler," *Tarih Enstitüsü Dergisi* 12 (January 1982), 208. See this article for documentation of offenses punished by *kürek* and their examples from various imperial registers (*Mühimme, Ruus* and a separate register documenting only *kürek* convicts—BOA, Kamil Kepeci 677) in the sixteenth century.

214 BOA, A. DVN. ŞKT 67, petition 87 (1157/1744–45).

215 İpşirli, "XVI. Asrın İkinci Yarısında Kürek Cezası ile İlgili Hükümler," 213. Zarinebaf, *Crime and Punishment in Istanbul*, 164–168. Zarinebaf claims that most convicts were released within a few months even if they were sentenced to longer terms. The punishment of sexual assault, according to her study, was usually one or two months. Zarinebaf, *Crime and Punishment in Istanbul*, 165. While my study confirms that convicts were frequently released from servitude as I examine in the following examples, the length of their stay in the servitude looks longer.

extensive analysis of crime and punishment in Istanbul,[216] all sorts of discretionary punishments were commuted to *kürek*. Zarinebaf states that the majority of the convicts who were sentenced to penal servitude in the galleys from 1719 to 1721 had been convicted of theft while "armed robbery, assault, homicide, sex crimes, sexual assault, conversion to Catholicism (mostly Armenians), running taverns, forgery, counterfeiting and selling light bread" were among the other crimes.[217] For example, Ahmed, who broke into someone's house and committed theft, was sent to Istanbul and sentenced to life servitude (*müebbet*) in the imperial dockyards because he was defined as a "habitual criminal."[218] However, almost a year later, his wife appealed to the Imperial Council asking for his pardon, and an imperial decree was written to the Bursa judge to investigate whether he had a moral guarantor (*kefil*) in Bursa so that he could be released from *kürek*.[219] According to Zaribenaf, in the early eighteenth century most convicts, including those sentenced for life, were released within a few months.[220] Like Ahmed who was accused of being a habitual criminal, the *kadı* of Bursa sent a notification to Istanbul about David, a Jewish Ottoman subject who had broken into Yako's house, attacked and wounded him, and assaulted his wife; the *kadı* requested that he be sent into servitude at the imperial dockyard. His punishment was also justified by the testimonies in court from the Jewish community, who affirmed his habitual criminality in

216 Two registers quoted by Heyd in his study are significant for mentioning a study of *kürek* punishment in the eighteenth-century Ottoman Empire. The first entitled *Defter-i mücriman der zindan-i tersane-i 'amire* (Register of the criminals in the imperial dockyards) was compiled in 1119/1707 and is available in BOA, Cevdet Adliye, 5576 (6 folios). The second one registered criminals sent to the galleys in the years 1132–40/1719–28 and is also available in BOA, Maliyeden Müdevver, 729 (347 pages). Heyd, *Studies in Old Ottoman Criminal Law*, 305. Zarinebaf worked on these two registers in addition to five other registers with the same title ranging from 1699 to 1708 to analyze crimes and the penalty of penal servitude in the galleys in Istanbul. See Zarinebaf, *Crime and Punishment in Istanbul*, 164–168.

217 Zarinebaf, *Crime and Punishment in Istanbul*, 165.

218 Ahmed was the son of the woman mentioned earlier who was sentenced to banishment on the island of Bozcaada for helping her son break into houses and commit theft. BCR, B166, 40B-39A/2.

219 BCR, B166, 16A/3. Zarinebaf states that most releases from the galleys were carried out with the petition of *kefil*s. These moral guarantors were responsible for the rehabilitation and integration of the released convict into the community. Zarinebaf, *Crime and Punishment in Istanbul*, 132, n. 30. For a detailed analysis of how the system of surety or guarantee (*kefalet*) worked in the late eighteenth century, see Başaran, *Selim III, Social Control and Policing in Istanbul*, 36–38, 107–110.

220 Zarinebaf, *Crime and Punishment in Istanbul*, 165.

"banditry and such."[221] These examples imply that, in the eighteenth century, any offense, including sexual offenses, could be punished at the "discretion" of the Ottoman authorities on the grounds that they sought to prevent repetitive crime that would lead to the disruption of public order.

The final and most severe discretionary punishment that we can trace in the legal records is capital punishment (*katl*). In the Ottoman context capital punishment was also called *siyaseten katl* (administrative death penalty) since it was under the discretion of the political authority, i.e., the sultan and his representatives in the Imperial Council. Homicide committed with a lethal weapon, arson, habitual theft, and many offenses against public order and security, such as serious violation of market regulations, counterfeiting, and disobedience to the sultan, were offenses punishable by death according to the "old criminal code" of the sixteenth century, while heresy, vituperation of the prophet and apostasy of a convert to Islam, highway robbery or banditry (*qat'al-tarik*), and fornication by married adult free Muslims (*muhsan*) were capital offenses according to the *shari'a*.[222] As for sexual offenses, in order to prevent repetition of the crime and to constitute an example to society, capital punishment (*siyaseten katl*) was prescribed in both the "old Ottoman criminal code" and the eighteenth-century Ottoman *fetva*s, as long as the offender was considered a "habitual criminal" as discussed earlier.[223] The execution of capital punishment, by hanging the outlaws on spot, i.e., in front of the place where they committed the crime, such as a shop or a house, or in certain designated places before the public, was meant to constitute an example for others and was not uncommon in eighteenth-century Istanbul.[224]

The court records in which the perpetrators of sexual crimes were sentenced to death show that the final decision of the central government was required. In our first example, we follow the process of the trial and conviction by the *kadı*, which was a requirement, in principle, for sentencing Ottoman

221 BCR, B166, 35A/2 and BCR, B166, 35A/3–35B/1.

222 Heyd, *Studies in Old Ottoman Criminal Law*, 259–262; Peters, *Crime and Punishment in Islamic Law*.

223 See Chapters 3 and 4.

224 Akman, *Osmanlı Devleti'nde Ceza Yargılaması*, 135. For the application of capital punishment as exemplary punishment in eighteenth-century Istanbul, see Zarinebaf, *Crime and Punishment in Istanbul*, 157–160. Başaran, *Selim III, Social Control and Policing in Istanbul*, 105. Zilfi, *Women and Slavery*, 60, 178. Baer cites an exceptional document on the execution of an adulterous couple in seventeenth-century Istanbul. While the married Muslim woman was stoned to death, her Jewish lover was beheaded in the Hippodrome before the public. Baer, "Death in the Hippodrome."

subjects to death.[225] In one case in the court of Ankara, two litigants, a woman called Kamer and a man called es-Seyyid Hasan, accused Mustafa of assaulting the former and stealing her jewelry as well as attacking the latter's home and attempting to rape his wife.[226] Since this case is described in more detail in Chapter 3, where I explain the symbolic importance of sexual violence in establishing the "excessiveness" and "habitual" nature of the crime, i.e., banditry, here I focus on the proceedings in the court that led to sentencing the culprit to the death penalty. Mustafa confessed to stealing from Kamer. Yet, since the community bore witness to his "habitual" criminality, the local mufti was asked for a *fetva* for capital punishment as follows:

> … if Zeyd, who was among bandits and mischief-makers, continuously breaks into houses with a lethal weapon and commits "forceful" fornication with the women and sodomy with the sons of some honorable men and thus violates their honor, and if he is habituated to such misdeeds and he is a fomenter of mischief [and this] has been established by the *shari'a,* is it lawful to kill him by "order of the guardian of the command" [imperial order]? Answer: Yes, it is …[227]

Finally, the *kadı* of Ankara gave his verdict for the execution of Mustafa, provided an "imperial order" was obtained and therefore he was handed over to the political authority (*veliyyü'l-emr*). Since sentencing a culprit to death was a very important decision for which the *kadı* would be held responsible, he also applied to the mufti to do all that was possible; first he wanted the *shari'a* support of the mufti and then a *siyasa* approval from the sultan. In other words, the politico-legal authority (*siyasa shar'iyya*) was approved by the community

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225 Heyd mentioned, by quoting Olivier, that a court trial and conviction by a *kadı* was necessary in order to sentence ordinary Ottoman subjects to the death penalty. He also explains that execution of administrative officials under the death penalty was by discretion of the sultan, the grand vizier, and the other viziers including the provincial governors of vizier rank; the legal justification was that such officials were servants of the sultan and therefore could not be punished by the *kadı* in accordance with the hierarchical nature of *ta'zir* punishments. Heyd, *Studies in Old Ottoman Criminal Law*, 262.

226 ACR, 121, 58 (Şevval 1154/January 1742).

227 "…eşkıyadan olub muzırü'n-nas olan Zeyd daiman alet-i harble gece ile menzil basub bazı ehl-i ırz kimesnelerin ırzların hetk ve avretlerine cebren zina ve oğullarına livata itmek mu'tadı olub azrar-ı ibadullah bu makule zulm ve ta'addi adet-i müstemirresi olub ve sa'i bi'l fesad olduğu şer'an sabit olsa şaki-yi mezburun emr-i veliyyü'l-emr ile katli şuru' olur mu cevab olur deyu ifta…" ACR, 121, 58 (Şevval 1154/January 1742).

and the judge through the *shari'a*. Yet, the mufti emphasized that an imperial order must be obtained for the execution of capital punishment.

The second and the third cases give us an even clearer idea about how executions took place. The second case is an imperial decree registered in the Bursa court records in February 1745.[228] The imperial decree was addressed to the janissary officer in Bursa and regards the execution of a bandit called Küserecioğlu İbrahim.[229] It reminds him that this bandit was originally among the ones to be executed according to a previous imperial order. Furthermore, it informs the janissary officer of the trial in the Bursa court at which the community testified to İbrahim's "habitual" criminal activities in the town, activities that included killing people and breaking into houses in order to abduct "chaste" women and take them into the mountains. Therefore, the imperial order said his punishment by death was lawful and should be executed (by the janissary officer) without delay.

The third document concerning the execution of the death penalty was also a letter to a janissary officer, but in this case it was written by the judge of Bursa.[230] The case was about two "evildoers" or outlaws who had committed an "indecent act" (*fi'l-i şeni'*) with a man called Abdurrahman in a bakery in Bursa. The *kadı* said that these two brigands, named İsmail Beşe and Kara Mehmed Beşe, had attacked and committed sodomy on Abdullah by force, with the assistance of four of their "men," seventeen days before the trial. The community gave testimony on the repetitive nature of the evildoing and mischief of these men, as the *kadı* stated in his letter. Finally, the *kadı* reminded the janissary officer that a judgment for the death penalty was given only after an imperial order arrived confirming it. Thus, he gave the janissary officer the order to execute the punishment. As explained, these cases are among the very rare examples in which we can trace the executions of punishments.

These documents, of course, show only the legal and formal face of the execution of the death penalty. It is unfortunately not possible to know how things worked outside the legal sphere. Mumcu claims that the administrative authorities, especially governors and deputy governors, used their executive power in an unlimited manner, "especially in the eighteenth century when the

228 BCR, B121, 242 (Zilhicce 1157/February 1745).

229 *Küsere*, a variant of *küstere* and *küstüre*, means (1) a carpenter's long plane, (2) a grindstone or millstone. *Küsereci* must be the one who either produces the grindstone or performs the profession of grinding (the crops?).

230 BCR, B121, 38 (6 Rebiü'l-ahir 1155/9–10 June 1742).

central control was weak."[231] On the one hand, this statement itself indicates the difficulty of controlling power struggles in provincial governments composed of various elements of the society, such as local notables, administrative state officials, intermediary local power brokers and groups who rose from simple taxpaying subjects to administrative authorities in a short period of time during the late seventeenth and early eighteenth centuries. In this regard, there must have been many extra-legal "executions" taking place during the period of these struggles. On the other hand, we cannot be sure that the central government really wanted to prevent these "executions." It is a well-known fact that the central government played both sides against each other in provincial politics.[232] In this sense, the central government was trying to show, through these procedural arrangements in the local courts, its own "discretion" to punish the outlaws and assert its legitimacy. Furthermore, the emphasis of the "loyal" *kadı*s and administrative authorities on the legality of the executions (by backing up the sentences with the authority of the *shari'a* and by securing the approval of the central government) was a sign of their anxiety to operate within these local power struggles in eighteenth-century Anatolia.

In Lieu of Conclusion: Silence and Outcry in the Records

In the eighteenth century the central government's anxieties about maintaining public order in the provinces and controlling the provincial authorities in accordance with its economic and social policies motivated the Ottoman imperial power toward greater control over penal administration and practices. Inevitably, the surveillance of "illicit" acts was closely related to the surveillance of "illicit" sexuality. Repeated sexual assaults were symbolized as outrages against the public order desired by the Ottoman political power, as Chapter 3 demonstrates. Similarly, illicit "intermingling" of the sexes in violation of the long-standing gender order signified a disturbance of social and public order among the various social groups and classes. In times of social and economic crisis, such intermingling and sexually "indecent" acts, which in fact existed

231 Ahmet Mumcu, *Osmanlı Devleti'nde Siyaseten Katl* (Ankara: Ajans Türk Matbaası, 1963), 142.

232 Barkey, *Bandits and Bureaucrats*; Barkey, *Empire of Difference*; Tamdoğan-Abel, "Les modalités de l'urbanité." For a recent study of the networks of violence and their relationship to the imperial government in Ottoman Rumelia at the end of the eighteenth century, see Esmer, "Economies of Violence"; Esmer, "The Precarious Intimacy of Honor"; "A Culture of Rebellion."

in all times, were treated as threats to the moral order; this was the case in the eighteenth-century Ottoman Empire. In those times, protecting the honor of its subjects also became a means to protect the honor and legitimacy of the imperial power.

In such an atmosphere, the imperial government attempted to organize its penal administration toward a more centrally scrutinized mechanism for the execution of punishments. During the sixteenth century fines were the most common form of discretionary punishment for sexual offenses, but these became less prevalent as a form of punishment in the eighteenth century,[233] mostly because the revenue from fines did not keep pace with the high inflation rates of the eighteenth century and thus was open to corruption by local authorities.[234] With the demise of fines, other forms of discretionary punishments had to fill the void. For milder sexual offenses, flogging on the spot and expulsion from the neighborhood continued to be the punishments preferred by the local authorities. However, for more serious sexual offenses, including habitual false accusation, sodomy, rape, abduction, all repeated (habitual) acts of sexual assault and contact, and banditry-related raids and attacks on people's houses, the Ottoman central administration sought to monopolize its discretion. At least, the imperial power was vociferous in its outcry to bind the local authorities to its discretion in Anatolia.

By efficiently employing its age-old jurisdictional right of *ta'zir* derived from the *shari'a*, the Ottoman state had already created firm foundations for this "discretion" through the redefinition and proliferation of the categories of sexual crimes; these categories were already clearly outlined in the sixteenth-century law books, and the legal practice and muftis' *fetva*s of the eighteenth century. The proliferation of record-keeping practices in the imperial center, which produced new registers (the provincial petitionary registers—*Ahkam* registers—and the fortress registers—*kal'abend* registers), and increased and systematized the practices of recording correspondence between the local *kadı*s and the imperial center in the court records all point to the centripetal tendencies of the Ottoman imperial power in the eighteenth century. Furthermore, we find important hints about the centripetal desires of the imperial center and the will of certain groups and subjects to deploy it by looking at the utilization of the Imperial Council as well as the governor's *divan*s as appellate courts by their clients and the activation of a judicial review mechanism in

233 Zarinebaf, *Crime and Punishment in Istanbul*, 164. Coşgel et al., "Crime and Punishment in Ottoman Times," 368–376.

234 Coşgel et al., "Crime and Punishment in Ottoman Times," 368–376.

many criminal investigations and judicial decisions. Thus, in the eighteenth century, the Ottoman imperial power attempted to control the penal system more closely as a result of its anxieties about provincial governance. Consequently, the administration of grave crimes concerning public order, of which sexual offenses constituted an important proportion, seemed to be administered mostly by the central government authorities in the eighteenth century.

Zarinebaf claims that "the role of the kadi diminished in the prosecution of crime due to the increasing jurisdiction of the Imperial Council" in Istanbul in the eighteenth century. She further states that in the eighteenth century convict labor in the galleys, banishment, and later imprisonment became the most dominant forms of punishments for all kinds of crimes in Istanbul, because the state took over the jurisdiction of punishing crime.[235] The discussion in this chapter about the interplay of legal documents proves that the situation was not any different, at least for the Anatolian province in the mid-eighteenth century. The imperial government seems to have applied similar mechanisms of checks and balances as well as stricter penal enforcement in the core region of the empire.[236]

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235 Zarinebaf, *Crime and Punishment in Istanbul*, 177.

236 Zarinebaf also claims that there was a gradual move from restorative and compensatory forms of punishment (such as corporal punishment or fines) to corrective punishment for sex crimes, crimes against property, assault, and homicide during the eighteenth century. See, Zarinebaf, *Crime and Punishment in Istanbul*, 174. Based on my data, I cannot make such an observation since I cannot substantiate the demise of certain punishments even if I can see from the records that certain types of punishments took place. Furthermore, it is not possible to track certain punishments which were inflicted locally, due to the continuing enigma of punishments in the court records.

Conclusion

The Ottoman state's centripetal surveillance of the provinces in the eighteenth century found its clearest expression in moral regulations over the sexual sphere. In this study, I argue that the legal regulations in moral and sexual domains and their enforcement were closely connected with—yet not limited to—the Ottoman central government's concerns to control social order in the provinces. The sexual sphere became a primary arena in which social conflicts and power struggles were articulated. The political jurisdiction of the Ottoman state was embodied in the techniques it used in regulating sexual crimes and gender relations.

The notion of honor dominated the legal discourse on sexuality and morality in eighteenth-century Anatolia. Protecting the honor of its subjects seems to have become an overwhelming legitimizing claim of the Ottoman imperial power, such that it justified its surveillance of and interventions in the sexual sphere. For instance, for the imperial government, controlling the excessive sexual violence of "bandits" and outlaws became a symbol of maintaining honor, justice, and gender order. Since these "bandits" or outlaws, as they were often defined in legal discourse, threatened the honor of the state by transgressing its rules, protecting the honor of its subjects was an important source of legitimacy for the imperial government. This study also indicates that such a moral discourse on the direct relationship between the government and its subjects can be interpreted on the one hand as the beginning of a novel relationship of the state with its subjects on the basis of the protection of "life, honor, and property," the grounds of which were later crystallized in the Tanzimat period. On the other hand, this moral language was established upon the foundations of the "circle of justice" of the old Ottoman political thought and its modification into pragmatic reform agendas in the framework of the *kanun* during the seventeenth century.

Ottoman subjects, in turn, claimed the protection of the Ottoman government by arguing in their petitions that these "bandits," through their constant assaults, were violating the honor of the populace. In this intensively rhetorical discourse, sexual violence often became one of the most important symbols of excessive criminality. Honor was also prevalent in the court language of the eighteenth century. Legal practices in the courts proliferated definitions and categories of sexual crimes, albeit through euphemistic and synecdochic expressions that toned down people's daily experiences of sexuality and crime. The expressions such as "indecent act" (*fi'l-i şeni'*) and "violation of honor" (*hetk-i ırz*) that were commonly used for sexual offenses in eighteenth-century

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legal records demarcated illicit from licit sexuality through moralistic terms concerning honor. This honor-laden terminology related to sexual crimes seems to have become more visible and identifiable in the legal practice of the courts in eighteenth-century Anatolia.

The terminology used for the majority of categories of sexual offenses, constructed through the interaction between the community and the courts in a complex interplay of legal genres, was not strictly *shari'a* based. The fact that in eighteenth-century legal practice the euphemistic expression *fi'l-i şeni'* ("indecent act") replaced *zina* (the *shari'a* based but still euphemistic, ambiguous term) reflects an increasing desire to avoid defining sexual offenses by using *shari'a* terminology. This redefinition of fornication "rescued" the illicit from the strict boundaries of the *shari'a* and thus provided flexibility to punish sexual offenses by using the principle of *ta'zir*, that is, discretionary punishment. Even though in principle the *shari'a* prescribed a more severe penalty for sexual offenses under the rubric of *zina*, it required such stringent procedures to prove the crime that conviction for any sexual offense became almost impossible in practice. Parallel to these redefinitions, in legal practice the categories of sexual crime multiplied through a selective deployment of existing normative law. While "deflowering" and "slander concerning unlawful sexual intercourse" were adopted from the *fiqh* and *fetva*s, other offenses with sexual connotations, such as reviling/cursing, abduction, and marrying by force, breaking into a house, and enticing boys and girls, were borrowed from the old terminology of the *kanun*. Thus, in this study, we observe in the legal practice of the courts of Ankara and Bursa that by either criminalizing or sexualizing certain acts that were not necessarily criminal or sexual according to normative law, sexual offense categories proliferated.

A discussion of the discretion of political power over sexual crime and its punishment relates to the larger issue of the relationship between the *kanun* (imperial law) and the *shari'a*, which is one of the major themes of this study. I demonstrate throughout this study that the sovereign's politico-administrative jurisdiction was in fact granted by the *shari'a* and thus the field of *kanun* in the Ottoman Empire was a practice of *siyasa* authority. Thus, the Ottoman state's jurisdiction over sexual crimes was neither contrary to the *shari'a* nor specific to eighteenth-century Ottoman legal practice. As other studies have demonstrated, since Hanafi doctrine granted this discretion to the Muslim sovereign through the principle of *ta'zir*, the Ottoman government had been deploying this discretionary power quite effectively.

While the promulgation of the *kanunname*s during the sixteenth century was a particular form of monopolizing and legitimizing the imperial government through *siyasa*, in later periods, law came to be the common property of

different social groups through which social and moral order was contested. Yet, contrary to the arguments about the demise of the *kanun* in the seventeenth and eighteenth centuries, it was still utilized, for various purposes, both in rhetoric and practice. While the private compilations of law books in the seventeenth century developed into new reform agendas in the genre of *kanunname*s to criticize the existing order with reference to the old *kanun*s, at the turn of the century some provincial *kanunname*s were used by the ruling elite to facilitate the privatization of land. The acknowledgment of the *siyasa* authority was evident in the *fetva* collections of the eighteenth century. Finally, this study shows that the *kanun* and *siyasa* of the imperial power continued to be utilized as a vivid force in legal practice, as evident in petitioning processes during the eighteenth century.

Imperial law (*kanun*) evolved in the eighteenth century as an amalgam of highly bureaucratized judicial institutions and sophisticated archiving and legal practices. This flexible form of imperial law likely enabled the central elite to constantly redefine and reformulate its relationship with the provincial powers. When, by the eighteenth century, the boundaries between rulers and ruled, the central and the provincial, Muslims and non-Muslims, and men and women blurred as a result of political, economic, and social transformations, imperial law operated through more hierarchized institutions and archiving practices.

The centripetal juridical "discretion" of Ottoman power in the eighteenth century was thus exercised through bureaucratized yet still loosely hierarchical appellate mechanisms as well as through its sophisticated record-keeping practices. Thanks to the bureaucratic structuring of the oligarchic government of the grand vizier, the Imperial Council took its position at the top of this appellate system. There it regulated and watched over the interactions between the *kadı* courts and provincial councils that were also organized through a loose judicial hierarchy in the provinces. Provincial judges who had judicial authority over lower judges under their jurisdiction were themselves incorporated under the jurisdiction of the provincial councils of governors, which by the eighteenth century seems to have acquired more authority as law enforcement centers in the provinces.

The watchful eye of the Ottoman central power in the eighteenth century was not, however, gifted with farsightedness. Early-modern technologies were unable to provide constant watch over the far corners of the empire. Furthermore, the ability to observe did not always mean they had the effective capacity to change the course of local events. However, with regard to the core region of the empire, such as the province of Anatolia, it was much easier to keep things under control through direct involvement and intervention in political and social struggles.

Petitioning played a central role within this organized yet myopic scrutiny of the social order. The eye of the central government supervised the course of events in the provinces. It was also the glue which stuck the local and central elements of the Ottoman judicial apparatus together. By the mid-eighteenth century the proliferation and diversification of the petitionary registers of the Imperial Council indicates an increasing desire on the part of the central government to scrutinize the provinces through petitioning. Petitions provided considerable information about local divisions and power struggles. The central government's promotion of petitioning through more efficient feedback mechanisms (thanks to the increasing bureaucracy and registers), in turn allowed Ottoman subjects to maneuver within the existing local power struggles by strategies such as playing one power cluster against another.[1] Petitioners often seemed to use the Imperial Council to either galvanize the legal processes against certain power groups in their locale or break the unjust coalitions of the local administrators.

In the eighteenth century we find another important indication of the centripetal judicial discretion of the Ottoman power, namely the appearance of a relatively more centrally organized penal system for the execution of punishments. In this period, the Ottoman central administration was more eager to monopolize discretion over punishments for serious sexual offenses such as rape, abduction, and various forms of sexual violence. In this research, one of the more significant findings is that most of the punishments imposed for sexual offenses in eighteenth-century Anatolia were indeed "discretionary punishments," the severity of which ranged from a simple warning to capital punishment. In discretionary punishments, the severity of the penalty and its execution were in principle left to the "discretion" of the politico-administrative jurisdiction in Islamic law. I demonstrate that in the eighteenth century this "discretion" was increasingly held and regulated by the Ottoman central government. Only for minor discretionary punishments, such as warnings, floggings, and expulsions from neighborhoods (imposed for sexual offenses), did local judges in Ankara and Bursa deliver sentences independently and

1 Başaran documents that Selim III, at the end of the eighteenth century, warned imperial officials not to accept petitions and submissions to the Imperial Council if they were written in an impudent manner and language. He once threatened the petition writers who wrote such petitions with immediate execution in front of their shops. Selim III thought that people appealed to the Imperial Council so frequently because his officials were not competent in identifying the legitimate needs of the petitioners properly. Başaran, *Selim III, Social Control and Policing in Istanbul*, 101. This phenomenon may also reflect, as Başaran indicates, an increase in petitioning in the years prior to the reign of Selim III.

execute them without approval from a higher authority. As the imperial orders registered in the court records of Ankara and Bursa reveal, in the eighteenth century many of the severe punishments for sexual offenses, for which the court had established guilt, were in fact meted out, or at least required to be approved, by the central government. Such closer scrutiny of the enforcement of punishments was only possible because of the existence of more efficient record-keeping practices and judicial review mechanisms through which local legal processes were monitored. The development, by the eighteenth century, of a centrally organized system for the confinement of culprits was both an indicator and an outcome of the Ottoman state's desire to monopolize penal administration. Within this framework, transgressions of the sexual order, through "repetitive" sexual violence and deviance, attracted the political power's practice of "discretion" because these acts constituted a threat to its honor.

The eighteenth-century developments with regard to the surveillance over sexuality can also be read from a different perspective, one which casts light on the developments that occurred in the nineteenth century. A shift in penal logic from "the vengeance of the sovereign to the defence of the society" seems to have been occurring in these periods.[2] As a result, "criminality, rather than crime, became the object of penal intervention" according to Foucault in relation to European history.[3] This shift is evident in Ottoman history in the discourse of the "protection of honor" as a legitimizing motive behind the interventions of political power in the sexual sphere. Furthermore, habitual criminals, labeled "bandits," were punished more severely in order to provide an "example" so as to prevent repetition of the crime. Başaran makes parallel observations on the increase in the aggressiveness of social regulation and sumptuary ordinances as well as exemplary punishments that were arbitrarily inflicted on outlaws in Istanbul during Selim III's reign at the end of the eighteenth century.[4] Similarly, Zarinebaf claims that during the eighteenth century the Ottoman penal system was in a state of transition from corporal punishment to correction as well as from the "private domain of the victim to the public domain of the state."[5]

Yet, the predisposition of Ottoman political power to scrutinize sexual and moral order in the eighteenth century was not then comparable to the endeavors and means of the Ottoman state during the nineteenth century. The early-modern power of the eighteenth century was not only deprived of the

2 Foucault, *Discipline and Punish*, 90.

3 Ibid., 100.

4 Başaran, *Selim III, Social Control and Policing in Istanbul*, 77, 102.

5 Zarinebaf, *Crime and Punishment in Istanbul*, 173.

"disciplines and technologies of power" over a "deployment of sexuality," but also of the desire to create a productive power through the control of the population in a Foucauldian sense.[6] For example, in this period, punishments were not yet standardized, uniformed, or quantified but rather left to the "discretion" of the law-enforcers. A correlation of the length of imprisonment with the severity of the crime, or the universalization of penalties in relation to crimes, was established only with the legal reforms of the nineteenth century. Whereas regulations concerning judicial and administrative authorities issued in 1838 still determined the punishment for "bribery" according to status (of the administrator), just as the principle of discretionary punishment did in the period here studied, the penal codes of 1840 and 1858 were constructed more in accordance with a discourse on "equality" and attempted to establish a universal principle of punishment based on the crime committed.[7] Furthermore, throughout the nineteenth century various councils, both at the imperial center and in the provinces, worked in a hierarchical and institutional appellate structure, compared to the loosely hierarchized appellate triangle of the *kadı* court, governor's council, and the Imperial Council in the eighteenth century.[8] Within this highly hierarchical judicial system, the scope of legal jurisdiction of local judges and their courts became narrower in the nineteenth century than it had been in the eighteenth century.[9] Yet one can recognize a path in governmental mode that proceeded from the eighteenth century toward the nineteenth century even though it was not necessarily linear.

This path becomes more visible in the discourse on the "protection of honor." By the eighteenth century, this discourse had started to determine the

6 Foucault, *Discipline and Punish*; Foucault, *The History of Sexuality*.

7 Cengiz Kırlı's study on the "invention" of corruption in the penal code of 1840 vividly demonstrates how a new legal discourse on "equality" was constructed to universalize punishment based on the crime. Cengiz Kırlı, "Yolsuzluğun İcadı: 1840 Ceza Kanunu, İktidar ve Bürokrasi," *Tarih ve Toplum Yeni Yaklaşımlar* 4 (2006). For the penal codes of 1840 and 1858, see Akgündüz, *Mukayeseli İslam*, 808–876.

8 For the various councils established throughout the nineteenth century, see Sedat Bingöl, *Tanzimat Devrinde Osmanlı'da Yargı Reformu* (*Nizamiye Mahkemelerinin Kuruluşu ve İşleyiş 1840–1876*) (Eskişehir: Anadolu Üniversitesi, 2004); Ekrem Buğra Ekinci, *Osmanlı Mahkemeleri, Tanzimat ve Sonrası* (Istanbul: Arı Sanat Yayınları, 2004); Musa Çadırcı, "Osmanlı İmparatorluğunda Eyalet ve Sancaklarda Meclislerin Oluşturulması," in *Yusuf Hikmet Bayur'a Armağan* (Ankara TTK, 1985); Avi Rubin, *Ottoman Nizamiye Courts: Law and Modernity* (New York: Palgrave Macmillan, 2011), 27–54.

9 Jun Akiba, "From Kadı to Naib: Reorganization of the Ottoman Sharia Judiciary in the Tanzimat Period," in *Frontiers of Ottoman Studies: State, Province, and the West*, ed. Colin Imber and Keiko Kiyotaki (London: I.B. Tauris, 2005), 43–60; Agmon, *Family & Court*, 235–238.

relationship of the Ottoman state with its subjects, but it became much more crystallized during the nineteenth century. In the eighteenth century, a new relationship between the Ottoman state and its subjects, one based on the "protection of honor," though not constitutionalized, was established through legal practice. However, in the nineteenth century, in the Tanzimat Edict of 1839, the Ottoman state codified this new relationship on the basis of the protection of "life, honor, and property." For the first time the penal code of 1858 explicitly used the expression "violation of honor" as an umbrella term to categorize sexual offenses; the term was established, though only in legal practice, in the eighteenth century.

By making such a rudimentary comparison between the governmental and punitive techniques of the Ottoman power in the eighteenth and nineteenth centuries, I do not wish to arrive at facile conclusions on continuity. My aim here is rather to offer an agenda for future research to explore possible fields of comparison between these different eras. Another, yet closely connected, field that may also be fertile for comparison is the relationship between honor, sexuality, and self in these two eras.

Studying the politics of honor in the eighteenth-century Ottoman Empire has important political and social implications today. It warns us to rethink our assumptions about the "inherent" relationship between the control of sexuality and Islamic law. Historicizing the governance of moral order in the Ottoman Empire shows the extent to which sexuality was a public matter regulated by the political power rather than something left to the discretion of normative Islamic law. This simple fact reminds us that we must not forget the feminist motto that "private is political" and thus it enables us to contextualize and historicize the politics of sexuality in any society, including those ruled by Islamic law, without falling into monolithic perceptions of Islam. Furthermore, such an endeavor may also indicate the historical precedents of the politics of honor which dominate the discourse and practice of gender in the Middle East today.

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